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IMMIGRATION LAW—THE CASE FOR NUNC PRO TUNC ADJUDICATION OF SECTION 212(c) APPLICATIONS WRONGFULLY DENIED BASED ON AN ERRONEOUS LEGAL INTERPRETATION

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INTRODUCTION

On October 22, 1996, Ramiro Fernándes Pereira appeared before an immigration judge.[1] He had been a lawful permanent resident of the United States for over twenty years, but was facing deportation after pleading guilty to a serious crime one year earlier.[2] Under the Immigration and Nationality Act (INA), Fernándes Pereira was considered an "alien" and the crime he had committed constituted an aggravated felony—a deportable offense.[3] To prevent his deportation, Fernándes Pereira applied for a waiver under INA section 212(c).[4]

Section 212(c) provided criminal aliens with relief from deportation at the discretion of the Attorney General.[5] If the waiver was granted to Fernándes Pereira, the grounds for his deportation would be eliminated and he could continue to reside in the United States as a lawful permanent resident.[6] Earlier that same year, however, Congress had passed two separate statutes, the Antiterrorism and Effective Death Penalty Act (AEDPA)[7] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[8] repealing section 212(c). Although Fernándes Pereira would have

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1. Fernándes Pereira v. Gonzales, 417 F.3d 38, 41 (1st Cir. 2005), *reh'g denied en banc*, 436 F.3d 11 (1st Cir. 2006).

2. *Id.* at 40.

3. *See id.*

4. *Id.* at 41.

5. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, tit. II, ch. 2, § 212(c), 66 Stat. 163, *amended by* Immigration Act of 1990, Pub. L. No. 101-649, tit. 5, subtit. A, § 511(a), 104 Stat. 4978, *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, tit. III, § 304, 110 Stat. 3009-597 (1996). References to INA section 212(c) (which was codified at 8 U.S.C. § 1182(c)) are made to the 1995 version of the statute, prior to its revocation.

6. *See* 6 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 74.04[5], 74.66.5 to 74.66.6 (rev. ed. 2007).

7. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Section 440(c) of the AEDPA barred aliens convicted of an aggravated felony from eligibility for a waiver under section 212(c). 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 74.04[1][b], at 74-35.

8. IIRIRA, 110 Stat. 3009-546.

been otherwise eligible for section 212(c) at the time of his hearing, the immigration judge concluded that the AEDPA and IIRIRA operated retroactively to preclude relief to aliens who were convicted prior to their enactment.[9] Since section 212(c) was no longer available to Fernándes Pereira, the immigration judge ordered him deported.[10] When Fernándes Pereira appealed to the Board of Immigration Appeals (BIA), the immigration judge's order was affirmed.[11]

The issue of retroactivity sparked a debate amongst the members of the BIA that eventually spilled into the federal courts. Over time, the court of appeals in each circuit overturned the decision that applied the Acts retroactively.[12] The Supreme Court also reached a similar result in 2001.[13] With the support of these decisions, Fernándes Pereira successfully moved the BIA to reopen his deportation proceedings.[14] When he appeared before an immigration judge this time, the judge concluded that Fernándes Pereira was no longer eligible for section 212(c).[15] In order to be eligible for relief under section 212(c), an alien convicted of an aggravated felony could not have served more than five years in prison.[16] By this time, Fernándes Pereira had been incarcerated for over five years. His petition for relief was denied once again.[17]

Undeterred, Fernándes Pereira filed a petition for a writ of habeas corpus, seeking judicial review of the BIA's decision.[18] His theory of relief was based on the equitable doctrine of *nunc pro tunc*, which means "now for then."[19] Fernándes Pereira argued that a *nunc pro tunc* order should have the effect of bringing him back to the date of his first final deportation hearing, so that his applica-

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9. *Fernándes Pereira*, 417 F.3d at 41.

10. *Id.*

11. *Id.*

12. In *In re* Soriano, 21 I. & N. Dec. 516 (B.I.A. 1996), the BIA held that the AEDPA applied retroactively to preclude criminal aliens from eligibility for section 212(c) relief after its effective date. As this line of cases came before the various courts of appeals, they overturned *Soriano*. *See infra* note 117 and accompanying text.

13. INS v. St. Cyr, 533 U.S. 289 (2001).

14. *Fernándes Pereira*, 417 F.3d at 41.

15. *Id.* at 42.

16. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414 tit. II, ch. 2, § 212(c), 66 Stat. 163, *amended by* Immigration Act of 1990, Pub. L. No. 101-649, tit. 5, subtit. A, § 511(a), 104 Stat. 5052, *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, tit. III, § 304, 110 Stat. 3009-597.

17. *Fernándes Pereira*, 417 F.3d at 42.

18. *Id.*

19. *Id.*

tion for section 212(c) could be properly heard—as if it were heard at the original time.[20] The Court of Appeals for the First Circuit, however, did not agree that *nunc pro tunc* was an available remedy in this particular circumstance and dismissed Pereira's appeal.[21]

Approximately seven months prior to the First Circuit's decision in *Fernándes Pereira*, the Court of Appeals for the Second Circuit decided *Edwards v. INS*.[22] Although the timing of events concerning the petitioners in *Edwards* was virtually identical to that of *Fernándes Pereira*, the petitioners were granted the *nunc pro tunc* opportunity to have their section 212(c) petitions heard.[23] Noting the enduring historical use of the *nunc pro tunc* doctrine in immigration law and the absence of specific congressional intent to preclude equitable relief, the *Edwards* court concluded that *nunc pro tunc* was properly awarded in such circumstances where agency delay prevented an alien from receiving relief that was rightfully deserved.[24]

The next to weigh in on the issue was the Court of Appeals for the Fifth Circuit.[25] In reviewing the BIA's decision, the Fifth Circuit Court of Appeals sided with the First Circuit in finding that it lacked the proper authority to employ the *nunc pro tunc* doctrine to remedy the erroneous denial of the petitioner's application for a section 212(c) waiver.[26] The court distinguished between the scope of its own *nunc pro tunc* power and that of the BIA.[27] Although the matter before the court was one concerning immigration, it found that it was not at liberty to exercise the same *nunc pro tunc* authority held by the BIA.[28] The case was remanded to the BIA to address whether the BIA's *nunc pro tunc* authority was available to remedy the error.[29] In doing so, the court held that if *nunc pro tunc* was allowed by the BIA, "then it could be used to reinstate [the petitioner]'s eligibility."[30]

Whether a *nunc pro tunc* remedy is appropriately applied to restore the availability of section 212(c) for criminal aliens is the

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20. *Id.* at 46-48.
21. *Id.* at 47.
22. Edwards v. INS, 393 F.3d 299 (2d Cir. 2004).
23. *Id.* at 312.
24. *Id.* at 308-12.
25. Romero-Rodriguez v. Gonzales, 488 F.3d 672 (5th Cir. 2007).
26. *Id.* at 678-79.
27. *Id.* at 677-79.
28. *Id.* at 677.
29. *Id.* at 679.
30. *Id.* at 679 n.9.

origin of a split between the Courts of Appeals for the First and Second Circuits.[31] While a case on point came before the Court of Appeals for the Fifth Circuit, it concluded that the BIA should decide the issue and remanded the case.[32] This Note proposes that *nunc pro tunc* relief should be afforded to those in circumstances similar to Fernándes Pereira who pled guilty to a deportable offense at a time when section 212(c) was still available. The conclusion presented is based on a crucial observation made by Justice Stevens that "there is a clear difference . . . between facing *possible* deportation and facing *certain* deportation."[33] By applying the 1996 Acts retroactively, and thereby eliminating their eligibility to receive section 212(c) relief, these aliens are now faced with no possibility of relief and certain deportation.

Part I of this Note begins with a short discussion of the development of immigration law in the United States. This discussion covers the doctrine of plenary power and the limits of judicial review under the administrative umbrella of the former Immigration and Naturalization Service (INS), now reorganized into the Department of Homeland Security (DHS) and the Department of Justice (DOJ), which review immigration decisions.[34] The discussion next moves to the deportation power delegated to the former INS by Congress and, more importantly, relief from deportation under section 212(c).

Part II examines the general concept of *nunc pro tunc* and the divergent views on the scope of its use. This Part also emphasizes

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31. Fernándes Pereira v. Gonzales, 417 F.3d 38, 46-48 (1st Cir. 2005), *reh'g denied en banc*, 436 F.3d 11 (1st Cir. 2006). *See generally* Corey M. Dennis, Comment, *Nunc Pro Tunc Relief Unavailable Where Erroneous Legal Interpretation Rendered Alien Ineligible for Deportation Waiver*—Pereira v. Gonzales, *417 F.3d 38 (1st Cir. 2005)*, 40 SUFFOLK U. L. REV. 1049 (2007).

32. *Romero-Rodriguez*, 488 F.3d at 679-80.

33. INS v. St. Cyr, 533 U.S. 289, 325 (2001) (emphasis added).

34. In March 2003, the agency known as the Immigration and Naturalization Service (INS) was effectively abolished and its functions were transferred to the newly created Department of Homeland Security (DHS). 1 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, at SA1-1. The Homeland Security Act of 2002 divided the functions of the former INS into three bureaus: the Bureau of Citizenship and Immigration Services (BCIS, sometimes referred to as the United States Citizenship and Immigration Services, or USCIS), the Bureau of Immigration and Customs Enforcement (BICE), and the Bureau of Customs and Border Protection (BCBP). *Id.* Some immigration procedures, such as the BIA and the immigration judges, remained within the Department of Justice (DOJ) and others remained with the Department of State (DOS). *Id.*; *see also* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. Many of the cases discussed in this Note began while the INS was still in existence, and some have continued beyond its dissolution and the creation of the DHS.

the special application of *nunc pro tunc* in the immigration context. Next, Part III covers the decisions by the three courts of appeals that have encountered this issue. Part IV argues that *nunc pro tunc* is a remedy supported by volumes of INS case law and should be applied under circumstances like those in *Fernándes Pereira* to ensure the equitable and just administration of immigration law. Finally, Part V demonstrates how the doctrine of *nunc pro tunc* should be applied in order to properly restore these petitioners' rights.

I. IMMIGRATION, DEPORTATION, AND THE SECTION 212(C) WAIVER FROM DEPORTATION

This Part provides a brief glimpse into the unique and complex nature of immigration law. First, it discusses the special constitutional status of immigration law. Second, it focuses on deportation—its definition and consequences. This Part ends with an overview of section 212(c) of the INA, the repeal of which has been the subject of much litigation.

A. *A Selected History of Immigration Law*

1. The Tumultuous Relationship Between Immigration Law and the Constitution

Immigration law is a notorious constitutional rogue.[35] Since the first Chinese exclusion laws were enacted in 1882,[36] courts have

35. As a flagrant constitutional nonconformist, immigration law has been described as "a maverick, a wild card, in our public law," Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984), a "constitutional oddity," Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984), and "a wart on the face of mainstream constitutional law," David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 854 (1998).

36. Entitled "An act to execute certain treaty stipulations relating to Chinese," the statute declared a ten-year suspension period during which Chinese laborers were prohibited from entering the country. The Act also prohibited the master of any vessel from knowingly transporting a Chinese laborer into the country. Although the Act did not apply to the Chinese already in the country, they were required to be registered with the collector of customs in their district so that they could receive a certificate of identification that would entitle them to reenter the United States if they chose to depart for any reason. The 1882 Act was followed by legislation in 1884 and again in 1888 that voided any certificates issued to Chinese laborers for reentrance into the country. The problem of Chinese laborers holding certificates who had been outside of the United States when Congress changed the law was at issue in the infamous Chinese Exclusion Case of Chae Chan Ping. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 597-99 (1889). For more about the Chinese exclusion

rationalized blatant congressional discrimination as the legislative branch's prerogative.[37] It has also long been recognized that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[38] Criticism of the "plenary power" that Congress has enjoyed in immigration regulation demonstrates the tension between the nation's desire to secure its borders and protect its sovereignty while respecting the rights given to all "persons" under its Constitution.[39] Allegations of equal protection violations are met with the response that "Congress has plenary authority to regulate matters of immigration and naturalization, and its authority extends to the classification of aliens as a basis for determining their eligibility to enter or remain in the United States."[40]

Grounded in precedent, Congress's plenary power to regulate immigration has never been refuted by the Supreme Court.[41] The Court has, however, displayed more recent reluctance to endorse the traditional doctrine of absolute power.[42] Although it is limited, the Court has recognized a justification for judicial scrutiny.[43] Per-

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laws and their effect on the plight of Chinese immigrants in America, see generally ESTELLE T. LAU, PAPER FAMILIES: IDENTITY, IMMIGRATION ADMINISTRATION, AND CHINESE EXCLUSION (2006).

37. *The Chinese Exclusion Case*, 130 U.S. at 606-11. Writing for a unanimous Supreme Court, Justice Field asserted

> [t]hat the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.

Id. at 603-04; *see also* Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 319 (1956) ("The [Supreme] Court has frequently proclaimed in its most sweeping language the plenary power of Congress in dealing with aliens, once stating that 'over no conceivable subject is the legislative power of Congress more complete . . . .'" (quoting Oceanic Steam Navigation Co. v. Strahan, 214 U.S. 320, 339 (1909))).

38. Matthews v. Diaz, 426 U.S. 67, 80 (1976).

39. The Fourteenth Amendment of the U.S. Constitution provides that "[n]o state shall . . . deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

40. Giusto v. INS, 9 F.3d 8, 9 (2d Cir. 1993).

41. Legomsky, *supra* note 35, at 291.

42. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 71.02[3][a]; *see also* Legomsky, *supra* note 35, at 303.

43. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (discussing the exercise of Congress's "exceptionally broad power" to define classes of admissible aliens may be subject to "narrow judicial review" in extreme cases); Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (despite "paramount federal power over immigration and naturali-

haps the most effective constitutional challenges to immigration laws, especially those concerning deportation, have been invoked under the Due Process Clause.[44] The Court has clearly recognized that the deportation process must observe procedural due process.[45] However, "the scope of procedural protection afforded by the Due Process Clause is a function of, *inter alia*, the magnitude of the individual interest at stake."[46] It is presumed that aliens seeking initial entrance into the country have less at stake than those who have resided in the country for a period of time as lawful permanent residents.[47] The Court has also been resolute in asserting exclusive federal jurisdiction over immigration matters, justifying such exclusivity by citing immigration's effects on foreign policy and uniformity of rules between states.[48]

2. Deportation

Deportation[49] is the expulsion of an alien who has entered the

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zation," broad discrimination justifies "some judicial scrutiny"). Outside the issue of immigration, the Supreme Court has upheld the rights of alien children of illegal immigrants to educational benefits and prohibited withholding welfare benefits based on alienage under the Equal Protection Clause. Plyer v. Doe, 457 U.S. 202 (1982); Graham v. Richardson, 403 U.S. 365 (1971). As the Supreme Court explained:

> The Fourteenth Amendment . . . is not confined to the protection of citizens. . . . [Its] provisions are universal in their application . . . without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

44. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

45. Legomsky, *supra* note 35, at 259; *see, e.g.*, Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86 (1903). Procedural due process rights appear to be the extent of the rights that courts are willing to confer on aliens in deportation proceedings. Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."). This right has been recognized since *The Japanese Immigrant Case*. Batanic v. INS, 12 F.3d 662, 666 (7th Cir. 1993). As the court in *Linnas v. INS* stated, "Congress has broad authority over the status of aliens, and there is no substantive due process right not to be deported." Linnas v. INS, 790 F.2d 1024, 1031 (2d Cir. 1986); *see, e.g.*, Galvan v. Press, 347 U.S. 522, 530-32 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 590-91 (1952); Bassett v. INS, 581 F.2d 1385, 1386-87 (10th Cir. 1978).

46. Legomsky, *supra* note 35, at 261.

47. *Id.*

48. *Id.* at 264-67; *see, e.g.*, Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 600-09 (1889); Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 598-99 (1884).

49. For purposes of this Note, the terms removal and deportation will be used interchangeably. Although the term "removal" was designated to refer to both "deportation" and "exclusion" after 1996 by the IIRIRA, it has been used by courts mostly to refer to deportation in the pre-1996 sense, in that it is the process for removing aliens

United States either legally or illegally.[50] An "alien" is defined by the INA as "any person not a citizen or national of the United States."[51] Although there is no specific power to deport recognized in the U.S. Constitution, the courts have declared that this power is inherent in the concept of sovereignty and critical for national security.[52]

A well-established tenet of immigration law is that the nature of deportation is civil and administrative, not criminal.[53] This distinction carries several critical consequences. Since deportation is not regarded as a criminal proceeding, it is not considered to be punishment.[54] This notion is what some call a "legal fiction" because of the difficulty in reconciling this civil classification with reality.[55] Despite the frequent call to "wipe the slate clean,"[56] courts

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physically present in the United States. 1 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 1.03[4][a], at 1-34.

50. 6 *id.* § 71.01[1], at 71-6.

51. INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2000). The distinction between a citizen and a lawful permanent resident (noncitizen) is, arguably, a mere difference in paperwork. The concept of "citizenship," which is tantamount to "membership," is a creation by people. It is "a legal construct, an abstraction, a theory." DAVID COLE, ENEMY ALIENS 216 (2003) (quoting Yale Law Professor Alexander Bickel writing about *Dred Scott v. Sanford*, 60 U.S. 393 (1856), and postulating that when a relationship between government and its people is based on citizenship, it can be "dissolved or denied" because of this abstract nature of citizenship).

52. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 71.02[1], at 71-18 to 71-19; *see* Mahler v. Eby, 264 U.S. 32, 39 (1924) ("The right to expel aliens is a sovereign power necessary to the safety of the country, and only limited by treaty obligations in respect thereto entered into with other governments.").

53. Schuck, *supra* note 35, at 24-27.

54. Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) ("[D]eportation [is not] a punishment; it is simply a refusal by the Government to harbor persons whom it does not want."). The Court has also stated that

> [t]he order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.

Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

55. Some would argue that deportation is indeed punishment and that it is illogical to conclude otherwise. Its characterization as a civil remedy has been criticized as insensitive to the realities of a deportee's plight: "The government's obligations to the alien are viewed as resting upon her formal status rather than upon her actual relationship to the society." Schuck, *supra* note 35, at 27.

56. In *Galvan v. Press*, Justice Frankfurter illustrated the struggle between the exercise of sovereignty and substantive due process:

> In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, . . . much could be said for the view,

have maintained this position.[57] As a noncriminal, nonpunitive sanction, deportation eludes many constitutional constraints such as the protections of the Sixth Amendment, which are limited to criminal proceedings.[58] Likewise, the prohibition of ex post facto laws under Article I, Section 9, is inapplicable to deportation proceedings.[59] Other limitations include the applicability of the Fourth Amendment exclusionary rule,[60] the allocation of the burden of proof, and the right to judicial review.[61] This distinction allows the process of deportation to escape constitutional scrutiny and leaves

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> were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation.
>
> But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 [(1921)], but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation.

Galvan v. Press, 347 U.S. 522, 530-31 (1954) (citation omitted). *See generally* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998) (discussing how retroactive deportation laws violate the Due Process Clause).

57. Scheidemann v. INS, 83 F.3d 1517, 1531 (3d Cir. 1996) (Sarokin, J., concurring) ("I suggest that now is the time to wipe the slate clean and admit to the long evident reality that deportation is punishment."); *see also Fong Yue Ting*, 149 U.S. at 741 (Brewer, J., dissenting) ("[I]f a banishment of this sort be not a punishment, and among the most severest of punishments, it will be difficult to imagine a doom to which the name can be applied.").

58. Schuck, *supra* note 35, at 25; *see, e.g.*, Mantell v. INS, 798 F.2d 124 (5th Cir. 1986) (holding that the right to counsel under Sixth Amendment is inapplicable to deportation proceedings); Argiz v. INS, 704 F.2d 384, 387 (7th Cir. 1983) (holding that the right to speedy trial under Sixth Amendment is inapplicable to deportation).

59. *E.g.*, *Galvan*, 347 U.S. at 530-32 (holding that the Ex Post Facto Clause does not apply to deportation because it is nonpunitive); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("'The inhibition against the passage of an ex post facto law by Congress in section 9 of article 1 of the Constitution applies only to criminal laws . . . and not to a deportation act like this . . . .'" (quoting Mahler v. Eby, 264 U.S. 32, 39 (1924))).

60. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding that the exclusionary rule barring admission of evidence obtained in violation of the Fourth Amendment is not applicable to deportation proceedings).

61. Schuck, *supra* note 35, at 25.

many aliens without the fundamental rights bestowed upon American citizens.

Grounds for deportation were originally viewed as supplementary to the early exclusionary laws, but have since significantly expanded in their scope.[62] The INA of 1952 categorized deportable aliens into nineteen general classes, many of which included multiple subclasses.[63] In 1990, the Immigration Act reorganized the grounds for deportation into six categories:[64] (1) "actions to uphold the integrity of the admissions process"; (2) penalization of "post-entry conviction of certain crimes," including drug offenses and violations of domestic protection orders; (3) purposeful and unexcused failure to provide personal information or valid documentation; (4) national security related grounds, including espionage, sabotage, and terrorist activities; (5) causes predating entry or "becoming a public charge within five years" of admission; and (6) voting without authorization.[65]

The consequences of deportation vary depending on the grounds of deportability.[66] A five-year bar to admission would apply to aliens removed for attempting to enter the country with fraudulent documents or by misrepresentation of material facts.[67] A separate ten-year bar is applicable to aliens who were ordered removed under INA section 240.[68] For a second or subsequent order of removal, the bar is twenty years.[69] For aliens removed on account of an aggravated felony conviction, the bar is permanent.[70] Aliens who are eligible for readmission must observe a mandatory waiting period before applying for reentry.[71] Deportation ends the continuity of an alien's lawful residence, which is necessary to apply for naturalization, and terminates the consideration of a pending

62. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 71.01[1], at 71-6; *see also* Maslow, *supra* note 37, at 231.

63. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 71.01[2][b][iii], at 71-7.

64. INA § 237(a), 8 U.S.C. § 1227(a) (2000).

65. 1 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 1.03[3][b], at 1-33.

66. *Id.*

67. INA § 237(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i).

68. Section 240 of the INA pertains to removal proceedings. Under section 240(a)(2), an alien placed in section 240 removal proceedings may be charged with any grounds for either inadmissibility or deportability described under INA sections 237(a) and 212(a) respectively. INA § 240(a)(2), 8 U.S.C. § 1229a(a)(2).

69. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 71.01[4][c], at 71-18.

70. *Id.*

71. *Id.*

application for naturalization.[72] Once deported, an alien who reenters the country without permission may face criminal charges or may be summarily removed.[73]

Depending on the status of the alien[74] and the grounds for deportation, certain remedies are available to avoid expulsion from the country. Possible remedies range from a motion to reopen removal proceedings or an application for a stay of deportation,[75] to an application for asylum and withholding of removal.[76] A common way to obtain relief from removal is an adjustment of status.[77] An adjustment of status allows an alien to change his status to that of a lawful permanent resident at the discretion of the Attorney General.[78] Adjustment of status is only available to aliens who gained admission after undergoing the inspection and admission process and were properly paroled into the United States.[79] There are several other forms of relief that come at the discretion of the government.[80] Discretionary forms of relief generally have two components: statutory eligibility requirements and the exercise of discretion by the government.[81] One form of discretionary relief existed under section 212(c) of the INA.

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72. *Id.*

73. *Id.*

74. The alien could be an illegal entrant, a refugee, a lawful permanent resident, a professional workers' visa holder, or a student visa holder, just to name some of the possibilities of an alien's status.

75. A person ordered deported may, in an emergency, apply for a stay of deportation under 8 C.F.R. § 241.6 (2006). The INS may even defer deportation in "compassionate" cases. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 72.08[1][c], at 72-205; *see also* 1 *id.* § 1.03[4][a], at 1-34.

76. Asylum and withholding of removal are available to persons threatened with persecution in their home countries because of their race, religion, nationality, membership in a certain social group, or political opinion, and are already in the United States. Those who are eligible may apply for asylum pursuant to INA § 208, 8 U.S.C. § 1158, and withholding of removal (which is now termed "nonrefoulment," as consistent with the United Nations Convention Relating to the Status of Refugees) under INA § 124(b)(2), 8 U.S.C. § 1251(b)(3). 1 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 1.03[5][b], [e], at 1-41.

77. *Id.* § 1.03[4][b], at 1-35.

78. INA § 245(a), 8 U.S.C. § 1254(a) (2000).

79. For an additional $1000 fee, an alien who entered without inspection or admission may become eligible for adjustment under INA § 245(i). 1 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 1.03[4][b], at 1-35.

80. Other forms of discretionary relief include suspension of deportation, waiver of misrepresentations in seeking entry, asylum or withholding of deportation, temporary release from custody, waiver of inadmissibility to remove ineligibility or other relief, and relief relating to alien entrepreneurs and their families. 6 *id.* § 72.04[6], at 72-128 to 72-134.

81. INA § 240(c)(4)(A), 8 U.S.C. § 1229(a).

3. Relief from Deportation: The Section 212(c) Discretionary Waiver

The predecessor to section 212(c) of the INA—section 3 of the Immigration Act of 1917—gave the Secretary of Labor[82] discretion to admit aliens who would otherwise be excludable.[83] The provision applied to aliens returning to the United States after a temporary absence to an "unrelinquished . . . domicile of 7 consecutive years."[84] Although the provision was only literally applicable to exclusion proceedings, the BIA adopted an interpretation that also applied the waiver to deportation proceedings.[85]

The application of section 212(c) to deportation has made an important difference in immigration proceedings due to the broad definition of deportable offenses under immigration law.[86] Because deportable offenses encompass such a wide range of activities, from acts of "moral turpitude"[87] to those classified as aggravated felonies,[88] a large class of lawful permanent residents are potentially

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82. Immigration was originally under the purview of the Department of Labor, thus giving authority over deportation to the Secretary of Labor. The INS was created in 1933 under the Department of Labor. *See* LAU, *supra* note 36, at 14-15. When the INS was transferred to the Department of Justice in 1940, the powers vested in the Secretary of Labor were transferred to the Attorney General. *Id.*

83. Immigration Act of 1917, § 3, 39 Stat. 875.

84. *In re* L—, 1 I. & N. Dec. 1, 5 (B.I.A. 1940).

85. *In re* Silva, 16 I. & N. Dec. 26, 30 (B.I.A. 1976) (adopting the holding in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976)). In *Francis*, the Court of Appeals for the Second Circuit held that the BIA's refusal to permit section 212(c) eligibility to a petitioner who was subject to deportation proceedings, and not exclusion proceedings, was based on a distinction without "any legitimate governmental interest" and, therefore, unconstitutional. *Francis*, 532 F.2d at 273.

86. INS v. St. Cyr, 533 U.S. 289, 295 (2001). In order to be eligible for the section 212(c) waiver in a deportation proceeding, there must be a corresponding ground for exclusion. RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 14:30 (2d ed. 2007); *see also* Caroleo v. Gonzales, 476 F.3d 158, 168 (3d Cir. 2007); Kim v. Gonzales, 468 F.3d 58, 62 (1st Cir. 2006). *But see* Blake v. Carbone, 489 F.3d 88, 105 (2d Cir. 2007) (concluding that the BIA should focus on the petitioners' particular offenses rather than the grounds for deportation).

87. Although Congress did not specifically define "moral turpitude," deference is given to the immigration agency's interpretation of the term (under *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984)), which defines it as "an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." Wei Cong Mei v. Ashcroft, 393 F.3d 737, 739 (7th Cir. 2004) (quoting *In re* Ajami, 22 I. & N. Dec. 949, 950 (B.I.A. 1999)).

88. The concept of an "aggravated felony" was first introduced in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181. 1 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 2.04[10][b], at 2-34. The definition of aggravated felony under the Act included murder, drug trafficking, and illicit trafficking of firearms. *Id.*

deportable, many of whom have committed minor offenses and have many countervailing equities in their favor.[89]

Prior to 1996, an alien in deportation proceedings could apply for a waiver from deportation under section 212(c) of the INA.[90] The waiver constituted a discretionary judgment by the Attorney General as to whether or not the criminal alien should be allowed a waiver from deportation. If relief was granted on the merits of the alien's claim, the cause of excludability or deportability was extinguished and the alien was returned to the same lawful resident status that he previously held.[91] Once granted, the waiver was valid indefinitely.[92]

Under section 212(c), the alien must meet several statutory requirements in order to be eligible for the waiver. First, the alien had to have been "[l]awfully admitted for permanent residence" in the United States.[93] In other words, the alien had to be a lawful permanent resident. Second, the alien had to have maintained an "unrelinquished . . . domicile of seven consecutive years" in the United States.[94] Section 212(c) remained free from substantial change from the time of its enactment in 1952 until 1990.[95] The Immigration Act of 1990 added, among other things, another criterion for section 212(c) eligibility:[96] aliens convicted of an aggra-

89. *See* Maslow, *supra* note 37, at 323 ("When an alien has come to the United States as a child and has been reared in this country, it is particularly unjust to ship him to some foreign land for a transgression that is in part the result of our environment and culture."). *See generally* Melissa Cook, Note, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293 (2003).

90. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 321(a)(1), 110 Stat. 3009-628 (amending INA § 101(a)(43), codified at 8 U.S.C. § 1101(a)(43) (2000)).

91. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 74.04[5], at 74-66.5 to 74-66.7.

92. 8 C.F.R. § 212.3(d) (2008).

93. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 74.04[1][a], at 74-34.

94. *Id.* Congress also decided to adopt a recommendation to include an additional requisite for section 212(c) eligibility. The alien could not have been excludable on subversive charges. *Id.* Since this is not a determinative factor in the line of cases involved in this Note, it will not be discussed.

95. *Id.*

96. Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (1990). Although the 1990 Act did not specify the effective date after which aggravated felony convictions would bar section 212(c) relief, the BIA and every circuit court to deliberate on the issue held that the 1990 Act worked retroactively to apply to aggravated felony convictions originally defined by the Anti-Drug Abuse Act of 1988 but occurring before its effective date of November 29, 1990. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 74.04[2][f], at 74-51; *see, e.g.*, *In re* Gomez-Giraldo, 20 I. & N. Dec. 957, 963 (B.I.A. 1995); *In re* A—A—, 20 I. & N. Dec. 492, 500 (B.I.A. 1992);

vated felony could not have served more than five years in prison for the offense.[97]

Obtaining a waiver was a hard-fought battle. The alien was charged with the task of presenting social and humane considerations as to why he should remain in the country to outweigh his undesirability as a U.S. resident or citizen.[98] Among the discretionary factors that would weigh against a section 212(c) petitioner's interest were: the severity of the deportable offense; substantial infringement of the immigration laws; the nature, recency, and gravity of any criminal record; and any circumstances evidencing poor character or undesirability as a U.S. resident.[99] Favorable factors that could be considered included: ties to family and community in the United States; extended residency; hardship or burden to the petitioner and petitioner's family; service in the military; employment record; community involvement; evidence of good moral character (through supporting affidavits from the petitioner's family, friends, and community members); and verification of rehabilitation if the petitioner had a criminal record.[100] The process of balancing adverse factors against favorable factors was carefully undertaken by immigration judges and the BIA.[101] Each decision was to be fully articulated to demonstrate that it had been reached through thoughtful and meaningful deliberation—otherwise, it could have been attacked as an abuse of discretion.[102]

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see also Scheidemann v. INS, 83 F.3d 1517, 1520 (3d Cir. 1996); Ignacio v. INS, 955 F.2d 295, 298 (5th Cir. 1992) (per curiam).

97. Both the AEDPA and IIRIRA expanded the definition of "aggravated felony," which has also been a cause for litigation, both because offenses that constitute an aggravated felony vary from state to state, Peter Adomeit, *Identical Acts, Different Results*, W. MASS. L. TRIB., Nov. 2006, at 10, and by those protesting the retroactive effects of the legislation, see 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 74.04[2][f][i], at 74-51.

98. *In re* Soriano, 21 I. & N. Dec. 516, 528 (B.I.A. 1996) (Rosenberg, Board Member, concurring in part and dissenting in part).

99. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 74.04[2][g], at 74-54 to 74-55.

100. *Id.* § 74.04[2][g], at 74-55; *see also* Cortes-Castillo v. INS, 997 F.2d 1199, 1203 (7th Cir. 1993).

101. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 74.04[2][g], at 74-55.

102. *Id.* In *Anderson v. McElroy*, the Court of Appeals for the Second Circuit reversed the BIA's denial of the petitioner's request for consideration for section 212(c) relief by finding the BIA's decision to be an abuse of discretion:

> When faced with cursory, summary or conclusory statements from the BIA, we cannot presume anything other than . . . an abuse of discretion, since "the BIA's denial of relief can be affirmed only on the basis articulated in the decision . . . and we cannot assume that the BIA considered factors that it failed to mention in its decision."

While obtaining a section 212(c) waiver was difficult, it was "the most extensive waiver provision of U.S. immigration law"[103] and an important form of relief for many aliens facing deportation. Between the years of 1989 and 1995, relief under section 212(c) was granted to over 10,000 applicants.[104]

Congress, however, continued with its trend of limiting the availability of section 212(c) with the AEDPA in 1996.[105] Section 440(d) of the AEDPA placed an outright ban on aggravated felons applying for section 212(c) relief.[106] The IIRIRA, also passed in 1996, repealed section 212(c) completely and replaced it with an analogous form of relief for which aggravated felons were not eligible.[107]

B. Soriano *to* St. Cyr*: The Debate on Retroactivity and Statutory Interpretation*

It is a long-standing principle that retroactivity is contrary to public expectation and leads to extreme unfairness.[108] Throughout its history, the Supreme Court has consistently recognized that "[r]etroactivity is not favored in the law."[109] Unless expressly provided in the language of the statute, there is a presumption against retroactivity.[110] This presumption rests on the idea that if Congress has enacted a law and expressly provided for retroactive application, then it has already considered the potential unfairness and de-

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Anderson v. McElroy, 953 F.2d 803, 806 (2d Cir. 1992) (quoting Mattis v. INS, 774 F.2d 965, 967 (9th Cir. 1985)).

103. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 74.04[1][a], at 74-35.

104. INS v. St. Cyr, 533 U.S. 289, 296 n.5 (2001) (citing Julie K. Rannik, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver*, 28 U. MIAMI INTER-AM. L. REV. 123, 150 n.80 (1996)).

105. 6 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 74.04[1][b], at 74-35.

106. Section 440(d) of the AEDPA barred relief under INA section 212(c) for any alien deportable for having committed any criminal offense constituting an aggravated felony, certain controlled substances and firearms offenses, as well as other miscellaneous crimes. 1 *id.* § 2.04[14][b][v], at 2-69. This essentially barred section 212(c) for virtually anyone convicted of a crime. The AEDPA also added a new INA section 242A(c) providing that an alien convicted of an aggravated felony would be "conclusively presumed" to be deportable. *Id.* § 2.04[14][b][vi], at 2-70.

107. *Id.* The new form of relief was called "cancellation of removal." *Id.*

108. *In re* Soriano, 21 I. & N. Dec. 516, 523 (B.I.A. 1996) (Rosenberg, Board Member, concurring in part and dissenting in part).

109. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); *see also Soriano*, 21 I. & N. Dec. at 523.

110. Landsgraf v. USI Film Products, 511 U.S. 244, 273 (1994). *See generally* Morawetz, *supra* note 56; Anjali Parekh Prakash, Note, *Changing the Rules: Arguing Against Retroactive Application of Deportation Statutes*, 72 N.Y.U. L. REV. 1420 (1997).

termined that the benefits of applying the law retroactively outweigh such potential for unfairness.[111]

Aware of the tension between immigration law and the Constitution, Congress had to be careful when drafting the laws affecting immigration in 1996. The IIRIRA provided that any section 212(c) relief would not be available to those who had been convicted of deportable offenses, regardless of the date of their conviction. However, the Act included a "saving provision," which excluded application of its amendments to removal proceedings in progress prior to its effective date of April 1, 1997.[112] While Congress had been explicit in directing how certain provisions were to be applied, the retroactive effect of the repeal of section 212(c) was ambiguous.[113] As such, it was left open to interpretation by the BIA and the courts.

1. *In re* Soriano

In a pivotal decision concerning Bartolome Jhonny Soriano, an alien in deportation proceedings in 1996 when the AEDPA was enacted, the BIA construed section 440(d) of the AEDPA to apply immediately, even to deportation proceedings already in progress.[114] Dissenting board members argued that this interpretation had an impermissible retroactive effect on actions predating the 1996 law, for example, making a decision to plead guilty to a crime that is a deportable offense.[115]

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111. INS v. St. Cyr, 533 U.S. 289, 316 (2001) (quoting *Landsgraf*, 511 U.S. at 272-73). Deference is usually given to the agency when interpreting its statutes, but the Court stated, "We only defer, however, to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." *Id.* at 321 n.45 (discussing and quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

112. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, tit. II, § 321(c), 110 Stat. 3009-628.

113. For example, section 413(g) of the AEDPA expressly states that the provision that applies to applications for asylum of alien terrorists are effective for those "before, on, or after" the effective date of the Act. *Soriano*, 21 I. & N. Dec. at 520; *see also* Wallace v. Reno, 194 F.3d 279, 286 (1st Cir. 1999).

114. *Soriano*, 21 I. & N. Dec. at 519. The basis of this decision was due to the absence of language stating that the section would have only prospective effect.

115. *Id.* at 528 (Rosenberg, Board Member, concurring in part and dissenting in part). Board Member Rosenberg opined that individuals did have "settled expectations" of section 212(c) as an available remedy when they decided to enter into a guilty plea or make other trial or appellate choices (not at the point of choosing to engage in criminal activity). *Id.* at 527. Rosenberg reasoned that without express direction from Congress, settled expectations should not be disturbed by giving retroactive effect to section 440(d) of the AEDPA where its application would attach new legal consequences to conduct and events already completed prior to its enactment. *Id.* at 529-30.

Cases following *Soriano* relied on the BIA's interpretation that section 440(d) of the AEDPA was effective immediately and applicable to aliens already in deportation proceedings at the time of its enactment.[116] Controversy among the federal courts ensued, and eventually a majority came to disagree with the BIA's conclusion in *Soriano*.[117] Depending on the judicial circuit in which the deportation proceedings were held, different rules applied. In response to this uneven effect, a rule was published by the Executive Office of Immigration Review (EOIR)[118] on January 22, 2001, in an attempt to make the availability of section 212(c) relief uniform.[119] Despite this rule, an issue remained as to whether an alien subject to deportation by reason of a criminal conviction prior to the 1996 acts, but not in deportation proceedings until after their respective effective dates, would be eligible for section 212(c) relief. The Supreme Court addressed this question in *INS v. St. Cyr*.[120]

2. INS v. St. Cyr

In rejecting the INS's contention that the IIRIRA provisions were clearly intended to apply to deportation proceedings initiated

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Rosenberg further postulated that due process and fundamental fairness required that applications for section 212(c) should be accepted *nunc pro tunc*, even if made after April 26, 1996. *Id.* at 528. Rosenberg's reasoning was later referenced by the Supreme Court in deciding *St. Cyr*, 533 U.S. at 324 n.52.

116. *E.g.*, Ozoanya v. Reno, 979 F. Supp. 447 (W.D. La. 1997); *see also* Vashti D. Van Wyke, Comment, *Retroactivity and Immigrant Crimes Since* St. Cyr*: Emerging Signs of Judicial Restraint*, 154 U. PA. L. REV. 741, 751 n.57 (2006).

117. The issue of whether the AEDPA applies to deportation proceedings pending at the time of enactment has mostly been settled by other circuits, which have concluded that it does not. *See* Wallace v. Reno, 194 F.3d 279, 287 (1st Cir. 1999); Pak v. Reno, 196 F.3d 666, 673 (6th Cir. 1999); Mayers v. U.S. Dep't of INS, 175 F.3d 1289, 1304 (11th Cir. 1999); Sandoval v. Reno, 166 F.3d 225, 242 (3d Cir. 1999); Henderson v. INS, 157 F.3d 106, 130 (2d Cir. 1998); *see also* Magana-Pizano v. INS, 200 F.3d 603, 614 (9th Cir. 1999); Shah v. Reno, 184 F.3d 719, 724 (8th Cir. 1999).

118. The EOIR supervises the BIA, the Chief Immigration Judge, and the Chief Administrative Hearing Officer. The immigration judges work under the Chief Immigration Judge and the administrative law judges work under the Chief Administrative Hearing Officer. 1 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 3.04, at 3-36.11.

119. Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 66 Fed. Reg. 6436 (Jan. 22, 2001) (codified at 8 C.F.R. pts. 3, 212, 240). Despite the rule, litigation persisted, as there were unanticipated permutations of circumstances surrounding aliens' claims for section 212(c) relief. The courts are still litigating section 212(c) applications for relief in 2008, over ten years after the 1996 legislations. *E.g.*, De Araujo v. Gonzales, 457 F.3d 146 (1st Cir. 2006); Fernándes Pereira v. Gonzales, 436 F.3d 11 (1st Cir. 2006); Montrevil v. Gonzales, 174 F. App'x 751 (4th Cir. 2006).

120. *St. Cyr*, 533 U.S. 289.

after the effective date of the statute and that the provisions operate prospectively and not retrospectively, the Court implied that Congress's intent is not conclusive.[121] Further, the Court suggested that the statute operates to impose an unallowable retroactive effect on aliens who, in reliance on the availability of the section 212(c) waiver, pled guilty to aggravated felonies.[122] The Court went on to discuss the special concerns raised by retroactively effective statutes and the strong presumption against them:

> [This] presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."[123]

Furthermore, the Court stated that the designation of an effective date for a statute does not sufficiently show that Congress has thought out the potential unfairness that its retroactive effects would produce.[124] In order to conclude that Congress intended for a statute to apply retroactively, the statutory language must be "so clear that it could sustain only one interpretation."[125] In concluding that the IIRIRA did not have the requisite clarity, the Court held that section 212(c) remained available for criminal aliens whose plea agreements gave rise to their deportability and who would have been eligible for section 212(c) relief at the time of their plea under the law in effect.[126]

St. Cyr opened the door to more applications for section 212(c) relief than would have been permitted by *Soriano*.[127] Based on *St. Cyr*, the DOJ published a rule on procedures for applying for section 212(c) relief.[128] This rule also allowed for special motions to

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121. *Id.* at 315.

122. *Id.*

123. *Id.* at 316 (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

124. *Id.* at 317.

125. *Id.* at 316-17 (quoting Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)).

126. *Id.* at 326.

127. *Id.*

128. Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 29 Fed. Reg. 57,826 (Sept. 28, 2004) (codified at 8 C.F.R. pts. 1003, 1212, and 1240).

reopen until April 26, 2005, in order to apply for section 212(c) relief.[129] Since this rule applied only to motions to reopen, a limited group of aliens who were placed in new removal proceedings would still be eligible to apply for section 212(c) relief.[130]

II. *NUNC PRO TUNC*: FROM THE BASIC DOCTRINE TO ITS BROADER MEANING AND USE

The following Part discusses the concept of *nunc pro tunc*. An overview of the basic doctrine is provided, followed by an examination of the scope of its use by the courts. More importantly, this Part also explains the use of *nunc pro tunc* in immigration, and reviews several practical applications in this context.

A. *Elements of* Nunc Pro Tunc: *The Basic Doctrine*

Nunc pro tunc, literally meaning "now for then," is a common law concept that is invoked as an equitable remedy.[131] Indicative of its versatility, *Black's Law Dictionary* vaguely defines *nunc pro tunc* as "[h]aving retroactive legal effect through a court's inherent power."[132] *Nunc pro tunc* is flexible, powerful, and may be used to remedy an assortment of problems. As explained by the Court of Appeals for the First Circuit, the nature of the doctrine is "loose . . . [and it is] used differently by different courts in different contexts."[133] Its utility has been applied in various areas of law, including family,[134] property,[135] criminal,[136] bankruptcy,[137] tax,[138] and

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129. *St. Cyr*, 533 U.S. at 326.

130. STEEL, *supra* note 86, § 14:30.

131. Referencing its discussion in *Weil v. Markowitz*, the Court of Appeals for the D.C. Circuit defined a *nunc pro tunc* order as "an equitable remedy traditionally used to apply a court's own order or judgment retroactively. Nunc pro tunc relief is 'available in order to promote 'fairness to the parties', and 'as justice may require.'" Ethyl Corp. v. Browner, 67 F.3d 941, 945 (D.C. Cir. 1995) (quoting Weil v. Markowitz, 898 F.2d 198, 200 (D.C. Cir. 1990)).

132. BLACK'S LAW DICTIONARY 1100 (8th ed. 2004). A more comprehensive and perhaps alternative definition is offered by the Free Legal Dictionary:

> [N]unc pro tunc (nuhnk proh tuhnk): adj. Latin for "now for then" this refers to changing back to an earlier date of an order, judgment, or filing of a document. Such a retroactive re-dating requires a court order which can be obtained by a showing that the earlier date would have been legal, and there was error, accidental omission, or neglect which has caused a problem or inconvenience which can be cured.

The Free Legal Dictionary, *Legal Definition of Nunc Pro Tunc*, http://legal-dictionary.thefreedictionary.com/nunc+pro+tunc (last visited Sept. 25, 2006).

133. Fierro v. Reno, 217 F.3d 1, 4-5 (1st Cir. 2000).

134. *E.g.*, Perkins v. Perkins, 114 N.E. 713 (Mass. 1917).

immigration law.[139] *Nunc pro tunc* remedies are most commonly given when an error has been committed by a court and should otherwise be retroactively corrected in order to avoid injustice.[140] When a *nunc pro tunc* order is granted, it is given legal force from the time of the original decision.[141]

Quite often, the legal effect of a judgment may not be felt until a later point in time.[142] If a significant error has occurred, it is likely to affect aspects of people's lives extraneous to the area of law in which the decision was rendered. For example, a judgment for the adoption of a child may affect that child's rights in a probate court administering her adoptive parent's estate.[143] Another com-

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135. *E.g.*, Haray v. Haray, 265 N.W. 466 (Mich. 1936); Sovereign Bank v. Harper, 674 A.2d 1085 (Pa. 1996) (granting a preliminary injunction requiring mortgagors to refrain from interfering with the sale of property *nunc pro tunc* to a time prior to the mortgagor's recording of revocation of deed).

136. *E.g.*, *Ex parte* Harris, 176 P.2d 508 (Okla. Crim. App. 1947) (using *nunc pro tunc* to allow petitioner, who was serving a prison sentence of fifteen years for a conviction for armed robbery, to serve a twenty-five year sentence for a like offense concurrently rather than successively).

137. *E.g.*, *In re* Windsor Commc'ns Group, Inc., 68 B.R. 1007 (Bankr. E.D. Pa. 1986). For a discussion on bankruptcy courts' *nunc pro tunc* power, see *In re Auto-Train Corp.*, 810 F.2d 270 (D.C. Cir. 1987).

138. In response to taxpayers attempting to reduce their federal tax liability or claim a refund by writing or stamping the words "*nunc pro tunc*" on their return, the Internal Revenue Service promulgated a ruling specifically prohibiting the practice, declaring it void of legal effect. Rev. Rul. 2006-17, 2006-1 C.B. 748, *available at* http://www.irs.gov/irb/2006-15_IRB/ar10.html.

139. *See, e.g.*, *In re* L—, 1 I. & N. Dec. 1 (B.I.A. 1940); *see also* discussion *infra* Part II.C.

140. Ethyl Corp. v. Browner, 67 F.3d 941, 945 (D.C. Cir. 1995) (quoting Weil v. Markowitz, 898 F.2d 198, 200 (D.C. Cir. 1990)); 56 AM. JUR. 2D *Motions, Rules, and Orders* § 58 (2000) [hereinafter *Motions, Rules, and Orders*] ("A court has inherent power to issue an order nunc pro tunc to avoid injustice." (citations omitted)).

141. *Harris*, 176 P.2d at 511 ("A nunc pro tunc entry of an order relates back and operates to make the order effective as of the date when it should have been entered."); West's Encyclopedia of Am. Law, Nunc Pro Tunc, http://www.enotes.com/wests-law-encyclopedia/nunc-pro-tunc (last visited Oct. 20, 2006).

142. Courts have held that, in order to be an effective remedy, the ability to make a *nunc pro tunc* correction "must continue until the error is called to the court's attention and corrected." *In re* Matter of Swandal, 587 P.2d 368, 372 (Mont. 1978).

143. In *Benjamin v. Celebrezze*, the plaintiff sought benefits under the Social Security Act as an adopted child of the deceased. Benjamin v. Celebrezze, No. 26100, 1965 WL 1438, at *1 (E.D. Mich. July 26, 1965). She had been placed in the custody of her adoptive parents, but her adoptive father, whose probate matter was before the court, died prior to receiving a proper adoption order. *Id.* As evidence of her status as the adopted child of the deceased, the plaintiff presented an "Order for Adoption—Immediate Confirmation" entered by the judge *nunc pro tunc* to the date of the hearing at which custody was granted to the adoptive parents. *Id.* If the order was honored, the child would be eligible to receive social security benefits. However, the court declined to honor the *nunc pro tunc* order because such an order had not, in fact, been made at

mon scenario requiring a *nunc pro tunc* order arises when a final divorce decree has not been entered and the deficiency presents a problem for at least one of the parties.[144]

The design and rationale behind *nunc pro tunc* allow its use in many different areas of law.[145] But despite its malleability, *nunc pro tunc* has several fixed characteristics. *Nunc pro tunc* is an applicable remedy where there is an error or omission, usually committed by a court, that has resulted in inconvenience or injustice to the parties.[146] When applied, *nunc pro tunc* should serve to correct the error or omission in a way that would restore justice to the affected parties.[147] Since this is the mandate of *nunc pro tunc*, courts hold divergent views regarding its scope. Some courts restrict its use to only the correction of clerical errors, while others employ it to change the outcome of a prior judgment entirely.

At the most widely accepted and basic level, *nunc pro tunc* is used to correct clerical errors or omissions made by a court.[148] A

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the earlier date. Rather, the court found that the original order was for supervision of the child by the adopting parents, in observance of the statutory one-year waiting period. *Id.* at *2.

144. In *Koester v. Estate of Koester*, the district court rendered a decision in a contested divorce, ruling that land held by Don and Sherry Koester was community property of the parties. Koester v. Estate of Koester, 693 P.2d 569, 571 (Nev. 1985). That same afternoon, Sherry was killed in a car accident. The decree of divorce, however, was not filed until the following day. This meant that the Koesters were not officially divorced at the time of the accident and that Don, as Sherry's husband, would take the land by that right. Sherry's estate moved to enter the time of filing *nunc pro tunc* to a time prior to her death. *Id.* Because the decree was adjudicated during the lifetime of the parties and could have been rendered immediately but, for some reason, was not entered on the judgment record at the time, the court found that a *nunc pro tunc* entry was proper. *Id.* at 572-73; *see also, e.g.*, McClintock v. McClintock, 138 P.3d 513, 515 (Nev. 2006) (not realizing that she was still married to her first husband when she married her second husband, Kelly McClintock petitioned to have her final decree of divorce entered *nunc pro tunc* to the date before her second marriage).

145. Other instances of *nunc pro tunc* usage include declarations by courts or governing bodies giving effect to actions or rules *nunc pro tunc* from a date in the past. *See, e.g.*, U.S. Bankr. Court for the W. Dist. of Pa., Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc (Oct. 16, 1984), *available at* http://www.pawb.uscourts.gov/pdfs/OrderOfReference.pdf.

146. Even under the narrow Massachusetts definition of *nunc pro tunc*, the court acknowledges the goal of the doctrine to "prevent a failure of justice." Perkins v. Perkins, 114 N.E. 713, 714 (Mass. 1917).

147. Weil v. Markowitz, 898 F.2d 198, 200 (D.C. Cir. 1990). General requirements of a *nunc pro tunc* order include the date that it is made, reference to the original order, and a description of what is to be corrected. Some jurisdictions require the record to reflect the facts authorizing the *nunc pro tunc* entry. *Motions, Rules, and Orders*, *supra* note 140, § 58.

148. *See, e.g.*, Fierro v. Reno, 217 F.3d 1, 5 (1st Cir. 2000) ("[A] clerical mistake in a judgment might be corrected nunc pro tunc when discovered later."); People v. Borja,

clerical error is defined as one that "does not result from judicial reasoning or determination."[149] Under this restricted use, the correction must be limited to reflect only what was originally intended by the court that entered the judgment; in other words, to make the record "speak the truth."[150] It may not be used to alter or enlarge the judgment previously rendered, nor may it be used to supply an action omitted by the court.[151] The courts that follow this strict definition of *nunc pro tunc* not only limit its use to clerical errors or omissions, they also emphasize that *nunc pro tunc* may not be used

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115 Cal. Rptr. 2d 728, 731 (Cal. Ct. App. 2002) ("[A] nunc pro tunc order is generally limited to correcting clerical errors."); Interstate Printing Co. v. Dep't of Revenue, 459 N.W.2d 519, 522-23 (Neb. 1990) ("Clerical errors may be corrected by an order nunc pro tunc but judicial errors may not."); Dickson v. State, 988 S.W.2d 261, 263 (Tex. Ct. App. 1998) ("A nunc pro tunc order may correct clerical errors in a judgment, but not judicial omissions or errors.").

149. *Dickson*, 988 S.W.2d at 263; *see, e.g.*, *Koester*, 693 P.2d at 573 n.2 ("Failure to file a final divorce decree then is a clerical omission."). In *In re Estate of Swandal*, the Supreme Court of Montana ordered a *nunc pro tunc* amendment to a decree of settlement of final account and distribution of estate. The district court had erroneously included mineral rights in the decree that had been previously conveyed to a third party. The estate was reopened and the error corrected. *In re* Estate of Swandal, 587 P.2d 368, 371 (Mont. 1978).

150. Gunia v. Morton, 120 N.W.2d 371, 373 (Neb. 1963). In defining the Michigan requirement for rendering relief *nunc pro tunc*, the Supreme Court of Michigan recites: "the office of a *nunc pro tunc* order is 'to speak what has been done, not to create'; or to supply an omission in the record of action really had but omitted through inadvertence or mistake or to enter an order which should have been made as a matter of course and as a legal duty." Haray v. Haray, 265 N.W. 466, 469 (Mich. 1936) (citations and emphasis omitted); *see also* Graber v. Iowa Dist. Court, 410 N.W.2d 224, 229 (Iowa 1987) ("A nunc pro tunc order can be used only to correct obvious errors or to make an order conform to the judge's original intent.").

151. *See, e.g.*, Johnson & Johnson v. Superior Court, 695 P.2d 1058, 1066 (Cal. 1985) ("[A] nunc pro tunc order cannot declare that something was done which was not done."); Perkins v. Hayward, 31 N.E. 670, 672 (Ind. 1892) ("Its office is not to supply omitted *action* by the court, but to supply an omission in the record of action really had, but omitted through inadvertence or mistake." (emphasis added)); *Interstate Printing Co.*, 459 N.W.2d at 522-23 ("It is proper for a court to make an entry nunc pro tunc so that its records will speak the truth."); Continental Oil Co. v. Harris, 333 N.W.2d 921, 923 (Neb. 1983) ("It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered . . . ."); McClintock v. McClintock, 138 P.3d 513, 514 (Nev. 2006) ("[A] nunc pro tunc order can only reflect that which was actually done."); Hawks v. McCormack, 71 P.2d 724, 725 (Okla. 1937) ("[T]he true function of a nunc pro tunc order is to make the record speak the truth relative to the judgment or order. This is to make the record reflect the true judgment or order intended by the court at the time the original judgment or order was entered."); Wyo. Nat'l Bank of Gillette v. Davis, 770 P.2d 215, 217 (Wyo. 1989) ("'[N]unc pro tunc is limited to cases where it is necessary to make the judgment speak the truth, and cannot be used to change the judgment.'" (quoting Arnold v. State, 306 P.2d 368, 374 (Wyo. 1957))); *see also Motions, Rules, and Orders*, *supra* note 140, § 58.

to correct judicial errors.[152] The Massachusetts Supreme Judicial Court held that "a defect in a judgment, order or decree which expressed exactly the intention of the court at the time when it was made cannot be remedied by a nunc pro tunc entry."[153] Thus, even if a judgment was later found to be erroneous, it would fall outside the scope of a *nunc pro tunc* correction.

Aside from the limitation of *nunc pro tunc* to correct only clerical errors to reflect the original intent of the court, there are certain instances where such discretion is simply not available.[154] An example of one such instance concerns the mandatory fees set by the legislature, which must be included with court document filings.[155] If a document is not accompanied by the appropriate fee, a court will not be willing to invoke *nunc pro tunc* to treat the document as filed at a previous date after the fee is paid. In certain circumstances, where precluded by either the express language of a statute or intent of the legislature, *nunc pro tunc* may not be invoked.[156]

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152. *See, e.g.*, Fed. Land Bank of Omaha v. Dunkelberger, 499 N.W.2d 305, 308-09 (Iowa Ct. App. 1993) ("Such an order is not for the purpose of correcting judicial thinking, a judicial conclusion, or mistake of law."); *Interstate Printing Co.*, 459 N.W.2d at 523; Ricketts v. Cont'l Nat'l Bank, 101 N.W.2d 153, 157 (Neb. 1960) ("[T]he purpose of an order nunc pro tunc is not to correct, change, or modify action previously taken by the court.").

153. Perkins v. Perkins, 114 N.E. 713, 714 (Mass. 1917).

154. Duran v. St. Luke's Hosp., 8 Cal. Rptr. 3d 1, 3-4 (2003).

155. Take, for example, the case of Celina Duran. *Id.* Duran attempted to file a complaint for medical malpractice against St. Luke's Hospital for allegedly causing the death of her infant. *Id.* at 1. Two days before the expiration of the statute of limitations, Duran's attorney sent the complaint, summons, and a check for $203 to the filing clerk. *Id.* at 1-2. The clerk received the documents, but did not file them because the check was $3 short of the required $206 filing fee. By the time the situation was made known to Duran's attorney, the statute of limitations had expired. *Id.* at 2. Duran then filed a petition for a *nunc pro tunc* order to declare the complaint filed on the date that the clerk received it. A sympathetic trial court, describing the situation as a "horror story" due to the "very, very minimal" shortage of $3 from meeting the filing fee, was forced to dismiss the petition for *nunc pro tunc* relief because clerks are statutorily mandated to refrain from filing any documents or pleadings if the requisite fees are not paid. *Id.* at 3. The court relied on a string of decisions upholding the requirement that filing fees be paid in advance, as a condition precedent to the performance of filing by the clerks. It also pointed to the legislature's statutory language in support of advanced payment of the "mandatory" filing fees. *Id.*

156. In *Powell v. Blevins*, the court declined to enter a *nunc pro tunc* order that would deem a document to be timely filed when it reached the clerk five days after the expiration of the filing period. The court noted that, to enter an order *nunc pro tunc*, it "cannot do more than supply a record of something that was actually done at the time to which it is retroactive." Powell v. Blevins, 365 S.W.2d 104, 106 (Ky. 1963). Because there was no earlier action to which the filing could relate back, a *nunc pro tunc* order would be inappropriate.

Other instances where courts have declined to order a *nunc pro tunc* remedy have been when the error or delay was not caused by the court but by the plaintiff or petitioner himself. Because the application of *nunc pro tunc* is discretionary, where the error is not attributable to the court, it is less inclined to give relief. The *Duran* court alluded to this notion in stating that when "evaluating the timeliness of a petition . . . 'it is the filer's actions that are scrutinized.'"[157] Other courts have precluded *nunc pro tunc* relief where the delay is caused by the laches of the parties.[158] Thus, eligibility for *nunc pro tunc* relief is also dependent on to whom the error is attributable.

B. *Expanding the Scope of* Nunc Pro Tunc

In contrast to the narrow application of *nunc pro tunc*, some courts have expanded the scope of *nunc pro tunc* relief beyond mere clerical corrections. Because the availability of *nunc pro tunc* is premised on ensuring a fair and just judgment, courts have also applied *nunc pro tunc* to change the outcome of a judgment or the original intent of the court. The paradigm case that applies *nunc pro tunc* to ensure a fair result is *Mitchell v. Overman*.[159] In *Mitchell*, Conrad Stutzman brought a suit against Robert Mitchell and several others on July 26, 1866.[160] The matter was taken under advisement by the district court at its October Term in 1868.[161] Unbeknownst to the defendants, Stutzman died on November 10, 1869, while the case was still under advisement.[162] No mention of his death was entered in the record, although his attorney continued to represent his interests.[163] When the district court finally rendered a judgment in Stutzman's favor on November 10, 1872, Mitchell re-

157. *Duran*, 8 Cal. Rptr. 3d at 3 (quoting United Farm Workers of Am. v. Agric. Labor Relations Bd., 694 P.2d 138, 142 (Cal. 1985)).

158. Mitchell v. Overman, 103 U.S. 62, 65 (1881). Laches is the "[u]nreasonable delay in pursuing a right or claim—almost always an equitable one—in a way that prejudices the party against whom relief is sought." BLACK'S LAW DICTIONARY, *supra* note 132, at 891; *see, e.g.*, Vernon v. Att'y Gen., 181 F. App'x 201, 203 (3d Cir. 2006) (failure of petitioner to pursue erroneously closed naturalization proceedings during the years of 1986 to 2003 compelled the court to deem him ineligible for *nunc pro tunc* relief).

159. *Mitchell*, 103 U.S. at 62.

160. *Id.*

161. *Id.* at 63.

162. *Id.*

163. *Id.* Overman was Stutzman's administrator who commenced the action to recover against Mitchell. *Id.*

sisted it on the ground that it was void because it was rendered after Stutzman had died.[164]

Attributing the delay in rendering the judgment to the lower court, the Supreme Court concluded that the legal maxim *actus curiae neminem gravabit*, meaning "[a]n act of the court will prejudice no one,"[165] dictated that a *nunc pro tunc* order should be given. For the "administration of justice," the Court found a duty to ensure that the parties involved did not unduly suffer because of the delay caused by the district court.[166] The Court reasoned that because Stutzman was alive and entitled to recovery when he submitted his claim, he continued to be entitled to recovery through its final disposition.[167] Consequently, the Court entered a *nunc pro tunc* order to treat the judgment for Stutzman as if it had been rendered at a time prior to his death.[168]

The *nunc pro tunc* doctrine has also been expanded to ensure a just result by encompassing correction of errors by government agencies.[169] In particular, the Court of Appeals for the D.C. Circuit has expressly applied *nunc pro tunc* "where necessary to put the victim of agency error 'in the . . . position it would have occupied but for the error.'"[170] For example, in *Ethyl Corp. v. Browner*,[171] the Environmental Protection Agency (EPA) denied the corporation a waiver that would permit the sale of fuel containing a certain additive.[172] Without the waiver, Ethyl Corporation would lose its registration to use the additive, which meant it would have to undergo what would have amounted to years of testing under newly adopted regulations.[173] When the court held that the EPA unlawfully withheld the waiver, it granted the waiver *nunc pro tunc* to the

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164. *Id.*

165. BLACK'S LAW DICTIONARY, *supra* note 132, at 1704.

166. *Mitchell*, 103 U.S. at 65 ("[U]pon the maxim *actus curiæ neminem gravabit*,—which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice,—it is the duty of the court to see that the parties shall not suffer by the delay.").

167. *Id.*

168. *Id.*

169. Sierra Club v. Whitman, 285 F.3d 63, 67 (D.C. Cir. 2002) ("On several occasions, this court has directed agencies to readjudicate matters retroactive to the date of the initial determination . . . .").

170. Ethyl Corp. v. Browner, 67 F.3d 941, 945 (D.C. Cir. 1995) (quoting Delta Data Sys. Corp. v. Webster, 744 F.2d 197, 206-07 (D.C. Cir. 1984)).

171. *Id.* at 941.

172. *Id.* at 942.

173. *Id.*

original date it should have been granted.[174] By awarding a waiver *nunc pro tunc*, the *Ethyl Corp.* court did not limit its scope to the correction of simple clerical errors, but actually reversed the EPA's decision to deny the waiver.[175]

The flexibility of *nunc pro tunc* has resulted in divergent views among state courts and federal courts alike. Parties who desire a *nunc pro tunc* remedy are, therefore, required to consider the law governing the applicability of *nunc pro tunc* in their respective jurisdictions. In addition, parties should take into account the nature of their claim—whether it is a state law or federal claim, whether there is a government agency involved, and also what area of law the subject matter of their claim involves. The same principle of *nunc pro tunc* is not applied uniformly across disciplines and largely depends on the unique issues presented by each system. The doctrine of *nunc pro tunc* has been extensively used to address the particular challenges presented in the area of immigration.

C. Nunc Pro Tunc *in Immigration*

1. The Broader Scope of *Nunc Pro Tunc* in Immigration

Nunc pro tunc has a "long and distinguished history" in immigration law.[176] Its availability recognizes the potentially harsh consequences that can result from the mechanical application of immigration law and the importance of mitigating these effects.[177] The principles behind the doctrine hold true in the immigration context. To further the interests of justice to the petitioner, *nunc pro tunc* is available to equitably remedy an error or omission committed by the agency or court and has a legal effect retroactive to the date of the original order. *Nunc pro tunc* has been applied broadly in matters concerning immigration and is not limited to the correction of clerical errors or to compliance with the original order by the agency.[178] Within immigration law, the use of *nunc pro tunc* enjoys a considerable range, including filing of timely applica-

174. *Id.* at 945.

175. *Id.*

176. Edwards v. INS, 393 F.3d 299, 308 (2d Cir. 2004).

177. *Id.*

178. Romero-Rodriguez v. Gonzales, 488 F.3d 672, 678 (5th Cir. 2007) ("The BIA . . . has a long history of employing *nunc pro tunc* to backdate proceedings and orders where the error was not clerical or where there was no error at all." (citing *Edwards*, 393 F.3d at 308)).

tions,[179] correcting records of entry,[180] and adjudicating deportation hearings due to previous violations of procedural due process.[181]

In the context of immigration, *nunc pro tunc* relief is granted in instances "limited to those in which the grant would effect a complete disposition of the case."[182] There are two situations where an immigration judge or the BIA has the power to grant *nunc pro tunc* relief in deportation decisions. The first of these circumstances is where the only ground of deportability would be extinguished.[183] The second is where an alien would be granted an adjustment of status, which would operate in conjunction with the grant of any appropriate waivers from deportation.[184] The discretion and authority to grant *nunc pro tunc* relief are conferred upon the Attorney General by law[185] and should be exercised "as is appropriate and necessary for the disposition of the case."[186]

2. Practical Applications of *Nunc Pro Tunc* in Immigration

a. Timely filing of applications

A common use of a *nunc pro tunc* order in the immigration context is the granting of a request to file a late application on time or an originally incorrectly filed application correctly.[187] Although not all circumstances allow for *nunc pro tunc* as an option, it may be a valuable tool in soliciting forgiveness for an inadvertent lapse in legal status from immigration officials. When the petitioners have

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179. *See, e.g.*, Murthy Law Firm, Nunc Pro Tunc H1B and H-4 Cases Approved (Sept. 8, 2006), http://www.murthy.com/news/n_nunpro.html.

180. *See, e.g.*, *In re* L—, 1 I. & N. Dec. 1 (B.I.A. 1940); *see also* discussion *infra* Part II.C.2.b.

181. *See, e.g.*, Snajder v. INS, 29 F.3d 1203 (7th Cir. 1994); Batanic v. INS, 12 F.3d 662 (7th Cir. 1993); *see also* discussion *infra* Part II.C.2.c.

182. *In re* Garcia-Linares, 21 I. & N. Dec. 254, 257 (B.I.A. 1996); *see, e.g.*, *In re* T—, 6 I. & N. Dec. 410 (B.I.A. 1954). In *In re T—*, the alien was charged with perjury and was deemed deportable for improper entry into the United States after being employed overseas as a civilian with the Lockheed Corporation serving the U.S. Army from 1943 to 1944. He had reentered, however, with a passport he had perjured himself to obtain. Desiring to serve overseas, he had claimed to be a U.S. citizen to obtain the passport; in reality, he had been admitted for permanent residency in 1911 when he was a year old. Because of his good moral character and allegiance to the United States, the BIA granted *nunc pro tunc* relief; in effect, waiving the grounds for his inadmissibility which served as the basis of the charges for which he was deportable and, thus, terminating the alien's immigration proceedings. *Id.*

183. *Garcia-Linares*, 21 I. & N. Dec. at 254.

184. *Id.*; *see e.g.*, *In re* Ducret, 15 I. & N. Dec. 620 (B.I.A. 1976).

185. INA § 212(c), 8 U.S.C. § 1182(c) (2000).

186. *In re* Vrettakos, 14 I. & N. Dec. 593, 597 (B.I.A. 1974).

187. Murthy Law Firm, *supra* note 179.

valid proof of inadvertence and, usually, some humanitarian reason for receiving relief, they may be allowed to apply *nunc pro tunc* for legal status.[188]

b. To correct records of entry

Nunc pro tunc is especially appropriate as a remedy in deportation proceedings, given the serious consequences of a deportation order and the tremendously unfair result if the order was made in error.[189] If an alien is deportable because of a defect in his record of entry, *nunc pro tunc* may be used to correct it.[190] In fact, the first reported case by the INS was one allowing such *nunc pro tunc* relief. The petitioner in *In re L—* was a lawful permanent resident of the United States, having originally entered the country in 1909.[191] In 1924, the petitioner pled guilty to larceny for taking a co-worker's watch from a shelf at his place of employment after some drinking.[192] Notwithstanding the conviction, he was found to be of "good moral character," and was issued a certificate of registry which was required for all aliens by the Registry Act of 1929.[193] In June of 1939, he made a trip to Yugoslavia to visit his seriously ill sister and returned to the United States in August without any incident at the border.[194] However, three and a half months after his return, deportation proceedings were instituted against the petitioner because he had not been properly inspected and admitted as an alien who had been convicted of larceny.[195]

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188. *Id.* An example of such inadvertence combined with a humanitarian reason would be a situation in which a husband is working in the United States on a H1B specialty occupation visa, and his pregnant wife is in H4 status (as the spouse of one in the United States on a H1B visa holder). In the event that the husband changes jobs, his company obtains an extension of his H1B approval. However, the company does not inform the couple that the wife's status also requires extension. The couple assumes that since the husband's status is in good standing, so is the wife's. Additionally, the wife, after giving birth, is unconcerned with checking her immigration status. Unknown to the couple, her status expires. They stumble across information that reveals the mistake, but find that it would be impractical for the wife and newborn to travel and, in addition, be apart from the husband. The wife is able to make a *nunc pro tunc* application for H4 status approval. *Id.*

189. Justice Brandeis once observed that deportation "may result also in loss of both property and life; or all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

190. IRA J. KURZBAN, KURZBAN'S IMMIGRATION SOURCEBOOK 841 (10th ed. 2006).

191. *In re* L—, 1 I. & N. Dec. 1, 1 (B.I.A. 1940).

192. *Id.* at 2.

193. *Id.* at 4.

194. *Id.*

195. *Id.*

At the time, the law allowed a waiver of exclusion at the discretion of the Attorney General.[196] The petitioner, however, was in deportation proceedings, not exclusion proceedings, because he had already been admitted to the country.[197] Finding that the petitioner was deserving of the waiver, the Attorney General concluded that it would be a "capricious and whimsical" operation of the immigration laws to require him to leave the country so that he could apply for the waiver of exclusion upon reentry.[198] For this reason, the Attorney General allowed a *nunc pro tunc* correction to the petitioner's record of entry in 1939.[199]

Since 1940, when *In re L—* was decided, the immigration laws have undergone significant changes. The grounds for deportation increased dramatically in the latter half of the twentieth century.[200] Because *nunc pro tunc* gives an order retroactive effect, it is an important form of relief from changes to the laws that have unfavorable consequences for aliens.

c. To remedy violations of due process

It is well established that aliens in deportation proceedings are entitled to due process of law.[201] The procedural requirements that deportation proceedings should observe include: (1) notice of the charges and notice of the time and place of the proceedings; (2) representation by an attorney; (3) "the reasonable opportunity to examine the evidence, present witnesses, and cross-examine adverse witnesses;" and (4) "a decision based on reasonable, substantial, and probative evidence."[202] Generally, if procedural errors deny an alien a hearing in compliance with due process, the remedy is to hold a new hearing.[203] In the event that circumstances have changed so that an alien's rights are diminished, and he is no longer eligible for certain types of relief, a *nunc pro tunc* order would serve to protect the alien's rights to the extent that they existed at the time of the original hearing.[204]

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196. *Id.* at 5; *see supra* notes 79-80 and accompanying text.

197. *L—*, 1 I. & N. Dec. at 5-6.

198. *Id.* at 5.

199. *Id.* at 6.

200. *See supra* Part I.A.2.

201. *See supra* note 42 and accompanying text.

202. Batanic v. INS, 12 F.3d 662, 667 (7th Cir. 1993) (referencing the statutory procedural requirements set forth in 8 U.S.C. § 1252(b)).

203. *Id.*

204. *See id.*

One instance in which a court issued a *nunc pro tunc* order to remedy a violation of due process in a deportation proceeding is *Batanic v. INS*.[205] Ivan Batanic, a lawful permanent resident, faced deportation on the basis of a conviction for delivery of a controlled substance.[206] Batanic's attorney failed to appear at his deportation hearing.[207] Despite the fact that the INS's attorney stated that he had no objection to an adjournment, the immigration judge decided to proceed with the hearing and, thereafter, found Batanic deportable.[208] The BIA reversed the immigration judge's order of deportation on the basis that Batanic's right to counsel had been infringed upon when the immigration judge continued with the hearing without his attorney present.[209] The proceedings were remanded to an immigration judge.[210]

Batanic, through counsel, moved to file an application for asylum. However, in the intervening time between the BIA's reversal and the remanded proceedings, amendments to the immigration laws had taken effect.[211] Under these amendments, an alien convicted of an aggravated felony was ineligible for asylum.[212] Batanic's motion to file for asylum was denied by the immigration judge because, under the new law, he was statutorily ineligible.[213] The BIA affirmed, denying Batanic's appeal.[214] In reviewing the BIA's decision, the Court of Appeals for the Seventh Circuit determined that the deprivation of Batanic's right to counsel equated to a deprivation of his right to apply for asylum, and that the BIA's position was inconsistent with the language of the statute.[215] Consequently, the court of appeals reversed the BIA's decision and ordered it to allow Batanic to file his application for asylum *nunc pro tunc*.[216]

Nunc pro tunc relief is readily given to aliens whose due process rights are violated during the course of a deportation proceed-

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205. *Id.* at 662.

206. *Id.* at 663. The controlled substance violation constituted an aggravated felony, thereby rendering Batanic deportable.

207. *Id.*

208. *Id.* at 664.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 664 n.3.

213. *Id.* at 664.

214. *Id.*

215. *Id.* at 667-68.

216. *Id.* at 668.

ing.[217] This circumstance may be the easiest in which to justify this type of relief. The INS is amenable to the use of *nunc pro tunc* when denial of relief from deportation rises to the level of a due process violation.[218] A problem arises, however, when the denial of relief falls short of being a violation of due process. In such a scenario, the INS has argued that *nunc pro tunc* is not an available remedy and should be limited to situations in which due process has not been properly given.[219] This, however, does not comport with the INS's own jurisprudence or practice.[220] As this Note will demonstrate, *nunc pro tunc* is an available remedy to those whose section 212(c) petitions were wrongfully denied.

III. THE FIRST, SECOND, AND FIFTH CIRCUIT VIEWS ON *NUNC PRO TUNC* ADJUDICATION OF SECTION 212(C) WAIVERS

This Part discusses the three cases that serve as the basis of the circuit split concerning the issue of whether a criminal alien should be allowed to have an application for section 212(c) relief adjudicated *nunc pro tunc* where the BIA relied on an erroneous decision in originally denying the application. The Court of Appeals for the Second Circuit was the first to decide the issue in *Edwards v. INS*.[221] Seven months later, the Court of Appeals for the First Circuit rendered its opinion on the issue in *Fernándes Pereira v. Gonzales*.[222] The Court of Appeals for the Fifth Circuit was the latest to weigh in on the controversy, with its decision in *Romero-Rodriguez v. Gonzales*.[223]

The basic fact pattern which gives rise to the issue in this Note is as follows. An alien is admitted to the United States as a lawful permanent resident and remains domiciled in the country for at least seven years. Before the AEDPA and IIRIRA are enacted, the alien commits an act that is considered an aggravated felony and, after entering a guilty plea, is convicted of the crime. The INS initiates deportation proceedings against the alien, who is serving time in prison for the conviction. Meanwhile, the AEDPA and IIRIRA

217. *See, e.g., id.*; Snajder v. INS, 29 F.3d 1203 (7th Cir. 1994).
218. Edwards v. INS, 393 F.3d 299, 310-11 (2d Cir. 2004).
219. *See id.* at 311.
220. *See supra* Part II.C.
221. *Edwards*, 393 F.3d 299.
222. Fernándes Pereira v. Gonzales, 417 F.3d 38 (1st Cir. 2005), *reh'g denied en banc*, 446 F.3d 11 (1st Cir. 2006).
223. Romero-Rodriguez v. Gonzales, 488 F.3d 672 (5th Cir. 2007).

are enacted into law, repealing section 212(c). When the alien appears before an immigration judge at a deportation hearing, the judge issues an order of deportation on the basis of the alien's aggravated felony conviction. The alien's appeal to the BIA and application for section 212(c) relief is denied because, according to the BIA's decision in *In re Soriano*, the waiver is no longer available to any alien convicted of an aggravated felony, even if the conviction was entered prior to the enactment of the AEDPA and IIRIRA.

The BIA's decision in *Soriano*, however, is later overturned by the court of appeals and, consequently, the alien is successful in moving the BIA to reopen the alien's deportation hearings. When the alien's case is remanded to an immigration judge, the application for section 212(c) relief is denied once again. This time, the application is denied because, by the time of the second hearing, the alien has served in excess of five years in prison, thereby rendering the alien statutorily ineligible for a section 212(c) waiver. The BIA affirms the immigration judge's decision and the alien petitions for a writ of habeas corpus in federal court.

A. *The Second Circuit*

Edwards v. INS consolidated appeals from two decisions: *Falconi v. INS*[224] and *Edwards v. INS*.[225] In *Falconi*, the district court found that but for the immigration judge and BIA's erroneous retroactive application of the AEDPA, Falconi would have been eligible to apply for section 212(c) relief at the time of her original hearing.[226] This was because, at that time, she had served less than five years in prison.[227] The court remanded the case to the INS with instructions to evaluate Falconi's section 212(c) application on its merits.[228]

Edwards differs slightly from the general fact pattern outlined above. In this case, the alien's original deportation hearing before an immigration judge occurred in 1995, prior to the passage of the AEDPA and IIRIRA.[229] The immigration judge found Edwards to be deportable, but granted his application for a section 212(c)

224. Falconi v. INS, 240 F. Supp. 2d 215 (E.D.N.Y. 2002), *aff'd sub nom.*, Edwards v. INS, 393 F.3d 299 (2d Cir. 2004).

225. Edwards v. INS, No. 02-CV-3309, 2003 WL 1786483 (E.D.N.Y. Mar. 28, 2003), *rev'd*, 393 F.3d 299.

226. *Falconi*, 240 F. Supp. 2d at 218.

227. *Id.*

228. *Id.*

229. *Edwards*, 393 F.3d at 304.

waiver because of the "outstanding equities" in his favor.[230] By the time the INS appealed, the AEDPA and IIRIRA were in effect, and the BIA revoked the section 212(c) waiver because, based on *Soriano*, the waiver was no longer available to Edwards.[231] His subsequent habeas petition was assigned to a district court judge who denied it, finding that the time Edwards served in prison after the original BIA decision counted towards the five-year bar.[232]

The Court of Appeals for the Second Circuit accepted appeals by both the INS (in the case of Falconi) and Edwards. The petitioners, Falconi and Edwards, raised two claims: (1) that eligibility for section 212(c) relief should be evaluated in relation to the alien's "status as of the time of the entry of an administratively final order of deportation";[233] and (2) that, "in the exercise of its equitable powers," the court should afford the petitioners *nunc pro tunc* relief.[234] The court declined to address the merits of the petitioner's first claim because, ultimately, it agreed with their second contention.[235]

In examining the statutory issue of when an alien's eligibility for section 212(c) should be determined, the court opined that if it were to study the BIA's section 212(c) jurisprudence, it could very well find that the time for determining whether the five-year bar had been reached should be when the "alien's final order of deportation was entered."[236] Furthermore, the court stated that INS regulations[237] could be read to support this position.[238] The court protested the "forceful" contention by the INS that time served in prison counts towards the five-year bar and continues to accrue indefinitely.[239] To illustrate its contention, the court even pointed to a decision holding that the erroneous denial of an opportunity to apply for a section 212(c) waiver is tantamount to a violation of due process.[240] In declining to discuss the petitioners' first contention that, as a matter of statutory construction, the proper date for de-

230. *Id.*
231. *Id.*
232. *Id.* at 305.
233. *Id.* at 306-07.
234. *Id.* at 307.
235. *Id.*
236. *Id.*
237. *See* discussion *infra* Part V.A.
238. *Edwards*, 393 F.3d at 307.
239. *Id.* at 308 (citing United States v. Copeland, 376 F.3d 61, 70-71 (2d Cir. 2004)).
240. *Id.*

termining whether an alien is eligible for section 212(c) relief is the date of the final deportation order, the court circumvented the need to discuss whether *Chevron* deference[241] should be afforded to the agency.[242]

The Court of Appeals for the Second Circuit noted that the doctrine of *nunc pro tunc* has been long-used in the field of immigration law.[243] The court further noted that its use has not been limited to the administrative bodies that execute immigration laws, but also has been applied by courts in order to return aliens to the position they would have been in but for an error in their immigration proceedings.[244] Thus, the court found that "it is . . . beyond question that an award of *nunc pro tunc* may, in an appropriate circumstance, be granted as a means of rectifying error in immigration proceedings," and is not limited to correction of only inadvertent clerical errors.[245] Only when an award of such equitable relief would contravene the express intent of Congress would it be impermissible.[246] Finding that Congress did not expressly preclude the use of *nunc pro tunc* relief in this particular instance, the court concluded that it was permitted to award section 212(c) relief *nunc pro tunc*.[247]

Since the court was not statutorily barred from employing a *nunc pro tunc* remedy, it could award such relief "as justice may require."[248] Because the consequence of denying a section 212(c) waiver was deportation for the alien, the court held that the petitioners needed only demonstrate that they were wrongfully denied the opportunity the apply for section 212(c) relief in order to be awarded a *nunc pro tunc* remedy.[249] Accordingly, the Second Circuit Court of Appeals affirmed the district court's decision in *Falconi*, remanding her case to the EOIR for a hearing on the merits of her section 212(c) application. Because Edwards was originally granted a section 212(c) waiver, his waiver was reinstated.[250]

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241. *Chevron* deference is "the deference that is afforded to an agency's interpretation of a statute that it is charged with administering." *Id.* at 308 n.11 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

242. *Id.* at 308.

243. *Id.*

244. *Id.* at 308-09.

245. *Id.* at 309 (citation omitted).

246. *Id.*

247. *Id.* at 310.

248. *Id.* (quoting Mitchell v. Overman, 103 U.S. 62, 65 (1882)).

249. *Id.* at 312.

250. *Id.*

B. *The First Circuit*

The Court of Appeals for the First Circuit relied on its decision in *Gomes v. Ashcroft*[251] in deciding *Fernándes Pereira v. Gonzales*,[252] determining that the time served in prison, even after a legally erroneous denial of section 212(c) relief, should count towards the five-year bar.[253] It came to this conclusion despite the fact that Gomes had served over five years in prison when the BIA issued its final order of removal whereas the petitioner, Fernándes Pereira, had not.[254] The court affirmed the BIA's finding that Fernándes Pereira was statutorily ineligible for the waiver at the time of his reopened deportation proceedings because he had served more than five years in prison by that time.[255]

The court rejected Fernándes Pereira's argument that the result of the decision was unfair to the point of being unconstitutional and concluded that Congress had no obligation to shelter aliens who committed felonies.[256] It was of no consequence, in the court's opinion, that Fernándes Pereira was once eligible for relief because he was now, according to the court's literal reading of the statutory language, simply ineligible to apply.[257] The court found that determining Fernándes Pereira's eligibility for the section 212(c) waiver at the time of his second deportation hearing was not a violation of the Due Process Clause.[258]

In deciding whether *nunc pro tunc* is appropriate, the court declined to follow the analysis by the Court of Appeals for the Second Circuit.[259] Instead, the court applied the Massachusetts definition of the *nunc pro tunc* doctrine, which states that "*nunc pro tunc* authority may only be used to correct inadvertent or clerical errors, and not to remedy 'a defect in a judgment, order, or decree which expressed exactly the intention of the [agency] at the time when it was made.'"[260] Consequently, the court determined that because

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251. Gomes v. Ashcroft, 311 F.3d 43 (1st Cir. 2002); *see infra* notes 340, 345.

252. Fernándes Pereira v. Gonzales, 417 F.3d 38 (1st Cir. 2005), *reh'g denied en banc*, 436 F.3d 11 (1st Cir. 2006).

253. *Id.* at 44.

254. *Id.*

255. *Id.* at 45.

256. *Id.* at 46.

257. *Id.* at 45-46.

258. *Id.* at 47-48.

259. *Id.* at 47.

260. *Id.* (quoting Fierro v. Reno, 217 F.3d 1, 5 (1st Cir. 2000)).

the legal interpretation made by the BIA was in good faith it could not be altered by employing the doctrine of *nunc pro tunc*.[261]

Fernándes Pereira subsequently petitioned for a rehearing, which was denied en banc.[262] Circuit Judge Lipez offered a dissenting opinion.[263] In his view, an en banc review would have been appropriate for two reasons: (1) the panel's finding that *nunc pro tunc* was not an available remedy improperly limited the availability of equitable relief for aliens and (2) the panel took the wrong approach in its due process analysis.[264] Judge Lipez expressed his concern over the panel's conclusory reasoning that because Congress limited relief to aliens with criminal records, it also intended to "preclude the agency from exercising the equitable relief that it has used to correct errors and further the interests of justice under extraordinary circumstances . . . ."[265] While Judge Lipez agreed with the panel's ultimate conclusion on the issue of due process, he found serious flaws with the panel's analysis.[266] Instead of focusing on the "good faith" of the agency, Judge Lipez asserted that the focus should have been on the consequences to the petitioner.[267] However, because Fernándes Pereira failed to demonstrate a reasonable likelihood that he would have been granted a section 212(c) waiver had he been permitted to apply, Judge Lipez found that there was not a sufficient showing of fundamental unfairness in his immigration proceedings.[268]

C. *The Fifth Circuit*

The Court of Appeals for the Fifth Circuit in *Romero-Rodriguez v. Gonzales*[269] reviewed the BIA's interpretation of section 212(c) under a *Chevron* analysis.[270] In the first step of the *Chevron* analysis, the court determined that Congress had not directly spoken to the particular question at issue.[271] The court concluded that the language of former section 212(c) was ambiguous because it did not consider the possibility that an alien could be in prison at the

261. *Id.*
262. Fernándes Pereira v. Gonzales, 436 F.3d 11, 11 (1st Cir. 2006).
263. *Id.* (Lipez, J., dissenting).
264. *Id.* at 13.
265. *Id.* at 14.
266. *Id.* at 17.
267. *Id.* at 19.
268. *Id.* at 18-19.
269. Romero-Rodriguez v. Gonzales, 488 F.3d 672 (5th Cir. 2007).
270. *Id.* at 675.
271. *Id.*

time eligibility for the waiver was determined. Consequently, the date for determining eligibility was unclear: was it the initial denial or the subsequent denial?[272]

Because it found section 212(c) to be ambiguous, the court proceeded to the second step of the *Chevron* analysis. It ascertained whether the BIA's interpretation of section 212(c)—that the relevant date for determining eligibility for the waiver is the date of denial following the reopening of the case—was "based on a permissible construction of the statute."[273] While it expressed sympathy for the alien's plight, the court found that there was nothing in the statutory framework that contradicted the BIA's construction of section 212(c).[274] Thus, pursuant to *Chevron*, the court deferred to the BIA's application of section 212(c).[275]

The court then proceeded to consider Romero-Rodriguez's petition for *nunc pro tunc* relief.[276] The crux of the court's decision was its distinction between the *nunc pro tunc* power of the BIA and its own *nunc pro tunc* power as a separate adjudicatory body.[277] The court's equitable *nunc pro tunc* power was, by the Fifth Circuit's definition, limited to correcting clerical or other record-keeping errors,[278] while the BIA had developed a "history of employing

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272. *Id.* at 676.

273. *Id.* (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984), and citing Heaven v. Gonzales, 473 F.3d 167, 175 (5th Cir. 2006)).

274. *Id.* at 676-77.

275. *Id.* at 677. A court may choose not to give deference to an agency's interpretation of a statute where its interpretation is inconsistent. Batanic v. INS, 12 F.3d 662, 666 (7th Cir. 1993). Because there were two sets of deportation hearings in this circumstance, the first hearing when the waiver was wrongfully denied and the second after a successful petition to reopen the hearings, the problem becomes even more complex. The language of the statute is certainly ambiguous on this point, as it does not take into account the possibility of a second set of deportation hearings. *See Romero-Rodriguez*, 480 F.3d at 676. Under *Chevron*, the *Batanic* court required the agency's interpretation to be "reasonable" (as opposed to merely "permissible"), stating that "'[d]eference does not mean acquiescence. As in other contexts in which we defer to an administrative interpretation of a statute, we do so . . . only if the administrative *interpretation is reasonable*.'" *Batanic*, 12 F.3d at 665-66 (quoting Presley v. Etowah County Comm'n, 502 U.S. 491, 508 (1992) (emphasis added)). The reasonableness of the BIA's evaluation of application of the section 212(c) at the time of the second set of hearings is debatable. Five years is a relatively short time span. Given that the petitioners who are in a position to open their proceedings must have been convicted of an aggravated felony prior to the passage of the 1996 acts, it is almost a certainty that they will have served over five years in prison at the time of their reopened hearings. It is doubtful that the BIA *reasonably* believed that reopening the hearing would change the outcome of the case if eligibility for the waiver is determined at the time of the second hearing.

276. *Romero-Rodriguez*, 488 F.3d at 677.

277. *Id.*

278. *Id.*

nunc pro tunc to backdate proceedings and orders where the error was not clerical or where there was no error at all."[279] Because the court determined that its *nunc pro tunc* power was limited to correction of clerical errors, even in the immigration context, the court declined to side with the Second Circuit Court of Appeals, which exercised its authority to require the BIA to consider section 212(c) petitions *nunc pro tunc*.[280] On this point, the Court of Appeals for the Fifth Circuit agreed with that of the First Circuit.[281]

Unlike the First Circuit, however, the court remanded the case to the BIA to address the question of whether the BIA's *nunc pro tunc* authority was available.[282] In doing so, the court made it clear that, should the BIA find that a *nunc pro tunc* remedy was available in this circumstance, it would have the effect of reinstating the petitioner's eligibility for a section 212(c) waiver.[283] In this respect, the court agreed with the determination made by the Court of Appeals for the Second Circuit—that the effect of a *nunc pro tunc* remedy would be to provide the alien with an opportunity to have his section 212(c) petition adjudicated on its merits.

IV. ALLOWING *NUNC PRO TUNC* RELIEF FOR CRIMINAL ALIENS WRONGFULLY DENIED A SECTION 212(C) HEARING BASED ON *SORIANO*

This next Part demonstrates that the doctrine of *nunc pro tunc* is an available and proper remedy for individuals whose petitions for section 212(c) relief were originally denied in reliance on *Soriano*. First, this Part establishes that the doctrine of *nunc pro tunc* remains available for use in conjunction with section 212(c) in the absence of an express prohibition by Congress. Second, it discusses why the application of *nunc pro tunc* in these particular cases is consistent with its accepted and common use in immigration law. Finally, this Part argues that *nunc pro tunc* is especially designed to correct errors, such as the one affecting the individuals in these cases, and that principles of equity dictate that *nunc pro tunc* be granted as a remedy.

279. *Id.* at 678 (citing Edwards v. INS, 393 F.3d 299, 308 (2d Cir. 2004)).

280. *Id.* at 678-79.

281. *Id.*

282. *Id.* at 679.

283. *Id.*

A. *The Persistence of* Nunc Pro Tunc *Application of Section 212(c)*

The availability of section 212(c) discretionary waivers *nunc pro tunc* continues to exist in the absence of express congressional intent to revoke such application of the waiver.[284] Since the enactment of the first rendition of the discretionary waiver in the Immigration Act of 1917,[285] relief from exclusion proceedings has been available *nunc pro tunc*.[286] Although the class of aliens that is eligible for the waiver has been gradually reduced, the discretionary waiver has survived the various amendments and recodifications to immigration laws through the years.[287] The INA in 1952,[288] the Immigration Act of 1990, and finally, the AEDPA of 1996 all preserved the ability to award section 212(c) waivers *nunc pro tunc*.[289] The agency's construction and the long-standing agency practice of affording section 212(c) relief *nunc pro tunc* reinforce its availability.[290] Despite its awareness of the practice of awarding section 212(c) relief *nunc pro tunc*, Congress has not taken any explicit steps to preclude *nunc pro tunc* application of the waiver.[291]

The IIRIRA finally repealed the section 212(c) discretionary waiver altogether in 1996.[292] However, the federal rules promulgated by the EOIR and the Attorney General following *St. Cyr* provide that the waiver remains available to the fortunate few who were eligible for it under the law at the time they had pled guilty to

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284. Edwards v. INS, 393 F.3d 299, 310 (2d Cir. 2004).

285. *See* discussion *supra* Part II.B.

286. *See, e.g.*, *In re* A—, 3 I. & N. Dec. 168, 172 (B.I.A. 1948) (Attorney General authorizing a *nunc pro tunc* exercise of the seventh proviso to section 3 and granting the alien lawful admission as of the original date of entry under the Immigration Act of 1917); *In re* L—, 1 I. & N. Dec. 1 (B.I.A. 1940) (correcting petitioner's record of entry *nunc pro tunc* to allow the Secretary of Labor to grant a discretionary waiver).

287. *Edwards*, 393 F.3d at 309.

288. *E.g.*, *In re* S—, 6 I. & N. Dec. 392, 394-96 (Att'y Gen. 1955); *see Edwards*, 393 F.3d at 310 ("[The BIA] review[ed] the legislative history of Immigration and Nationality Act of 1952, and conclud[ed] that Congress, in recodifying the Seventh Proviso as § 212(c), did not intend to preclude *nunc pro tunc* awards of relief.").

289. *Edwards*, 393 F.3d at 310.

290. Patel v. Gonzales, 432 F.3d 685, 694 (6th Cir. 2005) ("[T]he BIA has interpreted amendments to the INA restricting the availability of discretionary waivers of deportation not to eliminate its authority to issue *nunc pro tunc* orders granting such waivers.").

291. *Edwards*, 393 F.3d at 310 n.14 (referring to *S—*, 6 I. & N. Dec. at 394-96).

292. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, tit. III, § 304(b), 110 Stat. 3009-597 (1996).

the aggravated felony offense that rendered them deportable.[293] Since the availability of the section 212(c) waiver persists and there is no record of congressional intent to revoke its availability,[294] its applicability to *nunc pro tunc* should also endure. The fact that Congress barred convicted aggravated felons from the new form of discretionary waiver does not mean that it also meant to preclude them from section 212(c) relief if they were rightfully eligible. This line of reasoning offends the reason that the doctrine of *nunc pro tunc* exists as a remedy—for the sake of equity and to promote justice for the petitioner.

B. *Application of* Nunc Pro Tunc *Is Consistent with Its Accepted and Common Use in the Immigration Context*

1. Circumstances in Which *Nunc Pro Tunc* Is Available in Immigration

BIA jurisprudence recognizes two well-defined circumstances in which it may allow *nunc pro tunc* proceedings.[295] The first circumstance is when the only ground for deportability or inadmissibility is eliminated by the granting of a *nunc pro tunc* order. The second circumstance is when the alien is granted an adjustment of status in connection with the grant of the appropriate waiver in order to negate the order of deportation.[296] In the circumstance at issue, the only ground for deportability would be eliminated if a *nunc pro tunc* order was granted. If a *nunc pro tunc* order is allowed and the BIA deems the petitioner to be deserving of the waiver, a complete disposition of a petitioner's case would occur. Thus, the only ground for deportation would be eliminated by the *nunc pro tunc* order to adjudicate the alien's petition for section 212(c) relief.

2. *Nunc Pro Tunc* and Principles of Equity in Immigration

Inevitably, a mechanical application of immigration law will lead to unfair outcomes for certain noncitizens. Although Congress has made efforts to avoid such unfair results, reality illustrates that not everyone fits cleanly into the rigid regulatory scheme. Under

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293. Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 66 Fed. Reg. 6436 (Jan. 22, 2001) (codified at 8 C.F.R. pts. 3, 212, 240).

294. *Edwards*, 393 F.3d at 310.

295. Romero-Rodriguez v. Gonzales, 488 F.3d 672, 679 (5th Cir. 2007) (discussing *Patel*, 432 F.3d 685).

296. *See* discussion *supra* Part II.C.1.

many circumstances, a finding of deportability for particular noncitizens offends our personal moral conscience and notions of justice.[297] For this reason, the availability of an equitable remedy is tantamount. As an equitable remedy, *nunc pro tunc* has been invoked countless times throughout our common law history, with the primary purpose of promoting fairness to the parties inconvenienced by judicial error.[298] In the immigration context, the BIA has exercised its *nunc pro tunc* authority even in the absence of agency error.[299]

The measure of fairness to be given to victims of judicial error is "as justice may require."[300] Society's notions of fairness and justice dictate that the remedy must be proportionate to the error or the harm caused to the party. Consequently, the *nunc pro tunc* correction of a simple clerical omission by a court to correct the record is just as appropriate as allowing a *nunc pro tunc* petition for section 212(c) relief where the agency's wrongful denial renders the petitioner ineligible for a discretionary waiver and, consequently, subject to deportation.

In addition to prescribing a *nunc pro tunc* remedy to avoid irreparable harm to the petitioner due to agency error, equity also demands that noncitizens who share the same basis for relief should be afforded the same opportunity to apply for a waiver from deportation. The Court of Appeals for the Second Circuit has previously held that "[f]undamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner."[301] The court further stated:

> We do not dispute the power of Congress to create different standards of admission and deportation for different groups of aliens. However, once those choices are made, individuals within a par-

297. *See generally* Cook, *supra* note 89.

298. Weil v. Markowitz, 898 F.2d 198, 200 (D.C. Cir. 1990) (quoting Mitchell v. Overman, 103 U.S. 62, 65 (1880)).

299. *Patel*, 432 F.3d at 694 ("BIA case law indicates that the BIA has the authority under the INA to issue *nunc pro tunc* orders even where there is no clear agency error.").

300. *Mitchell*, 103 U.S. at 65.

301. Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976). It is interesting that, in this context, the court is willing to call the disparate treatment between lawful permanent residents who are being deported and those being excluded fundamentally unfair. Yet, no court has said that a group of lawful permanent residents facing deportation on the same grounds being treated disparately due to an erroneous legal interpretation is fundamentally unfair.

> ticular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest.[302]

The Supreme Court, in *St. Cyr*, held that aliens who pled guilty to aggravated felony offenses that served as grounds for deportation should be allowed to apply for the section 212(c) relief that existed at the time of their plea agreements.[303] Accordingly, this holding should apply to *all* aliens who were statutorily eligible for section 212(c) relief at the time of their plea agreements. Those who had their section 212(c) petitions denied based on the erroneous retroactive application of the AEDPA in *Soriano* should not have this right abrogated while those whose section 212(c) petitions are heard after *Soriano* was overturned were allowed to present their petitions on their merits.[304] No legitimate governmental interest is served by treating these two groups of petitioners differently.

St. Cyr serves to protect aliens who pled guilty to a deportable offense prior to the change in law. Undisputedly, these petitioners, who pled guilty prior to the 1996 laws, fall within that protected group. Petitioners, like Fernándes Pereira, had the misfortune of being among the first group of deportation proceedings held by the BIA after the 1996 changes and *Soriano*. Had their petitions been heard after *Soriano* was overturned, their petitions for section 212(c) relief would have been adjudicated on their merits. Disallowing *nunc pro tunc* relief to these aliens would circumvent the principles of *St. Cyr* and the other decisions by the federal courts below that overturned *Soriano*. Because *nunc pro tunc* should be properly invoked "to rectify *any injustice* suffered by [the petitioner] on account of judicial delay," it would be properly invoked in this circumstance.[305]

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302. *Id.* (citation omitted).

303. INS v. St. Cyr, 533 U.S. 289, 326 (2001).

304. This result would be a "capricious and whimsical" operation of immigration laws that the BIA itself concluded to be clearly unintended by Congress. *In re* L—, 1 I. & N. Dec. 1, 5 (B.I.A. 1940); *see* discussion *supra* Part II.C.2.b. The BIA asserted that it would be a "capricious and whimsical" operation of the immigrations laws if the petitioner was actually required to leave the country so that he would be able to apply for a waiver from exclusion at the border upon reentrance. *Mitchell*, 103 U.S. at 65.

305. Weil v. Markowitz, 829 F.2d 166, 174-75 (D.C. Cir. 1987) (emphasis added).

3. *Nunc Pro Tunc* Is Available in the Context of Immigration and Is Not Limited by the Courts' Traditional *Nunc Pro Tunc* Power

The Court of Appeals for the Fifth Circuit distinguished between the *nunc pro tunc* authority held by the courts and the *nunc pro tunc* authority held by the BIA.[306] It concluded that its own inherent *nunc pro tunc* power was limited to correction only of clerical errors, even though the matter before the court concerned immigration.[307] The Court of Appeals for the Sixth Circuit made a similar distinction, concluding that "the power of the BIA to enter *nunc pro tunc* orders is greater than that of federal courts."[308] However, according to the Court of Appeals for the Second Circuit, "[c]ourts, also, have relied on the doctrine, in order to return aliens to the position in which they would have been, but for a significant error in their immigration proceedings."[309] The court rejected the contention that, in order for a court to grant *nunc pro tunc* relief, the agency's conduct must rise to the level of a due process violation.[310] The distinguishing factor in the issue at hand, according to the court, is that the petitioners are being deprived of the opportunity to apply for relief from deportation, whereas previous cases involved illegal reentry.[311] The court concluded that, where circumstances merit the exercise of equitable power in the immigration context, *nunc pro tunc* relief may be properly awarded regardless of which adjudicatory body is rendering the decision.[312]

While it may be ideal for the BIA to address whether petitioners should be granted their request for *nunc pro tunc* relief, it is not out of the question for the solution to this problem to originate from the courts. For example, it was the Court of Appeals for the Second Circuit that first held that section 212(c) should be applied

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306. Romero-Rodriguez v. Gonzales, 488 F.3d 672, 677-78 (5th Cir. 2007) (discussing Patel v. Gonzales, 432 F.3d 685 (6th Cir. 2005)).

307. *Id.* at 678-79 ("Like the First Circuit, we do not believe that the courts' *nunc pro tunc* authority is any broader in the context of immigration than it is in other contexts.").

308. *Patel*, 432 F.3d at 694.

309. Edwards v. INS, 393 F.3d 299, 308-09 (2d Cir. 2004); *see, e.g.*, Batanic v. INS, 12 F.3d 662 (7th Cir. 1993); *see also, e.g.*, Castillo-Perez v. INS, 212 F.3d 518, 528 (9th Cir. 2000). While the *Castillo-Perez* court did not specifically label its remedy as a *nunc pro tunc* remedy, it remanded the case with instructions to "apply the law as it existed at the time of Castillo's hearing before the [immigration judge]." *Id.*

310. *Edwards*, 393 F.3d at 311.

311. *Id.*

312. *Id.* at 311-12.

to deportation proceedings and not be limited to exclusion proceedings.[313] The BIA subsequently made the decision to adopt this position[314] and has applied the rule in this manner ever since. In a similar vein, the Second Circuit Court of Appeals has taken the initiative to administer a *nunc pro tunc* remedy.[315] Not only is this exercise of a broader *nunc pro tunc* authority permissible, it also has the potential to save judicial time. Instead of remanding the issue back to the BIA, the court can decide the issue itself without further delay.

C. *The Proper Use of* Nunc Pro Tunc *for Section 212(c) Relief*

1. The Office of *Nunc Pro Tunc*: Correction of Errors

When a denial of adjudication of a section 212(c) petition is based solely on an erroneous retroactive application of a newly enacted law, *nunc pro tunc* should be applied to remedy the error.[316] Generally, *nunc pro tunc* is an option for relief when there is an error or omission, either committed by inadvertence or mistake, that has resulted in injustice to the parties.[317] In this circumstance, the reliance on *Soriano*'s improper interpretation of the AEDPA led to the wrongful denial of section 212(c) petitions.[318] Regardless of whether this error was committed by inadvertence or mistake, the result caused great injustice to the petitioners, because it barred them from their last opportunity to seek relief from deportation.

The Court of Appeals for the Second Circuit stated that the standards established by *Mitchell v. Overman* and its progeny mandate that *nunc pro tunc* relief be awarded "where agency error would otherwise result in an alien being deprived of the opportunity to seek a particular form of deportation relief."[319] A complete rectification of this error should not only involve reopening immi-

313. Francis v. INS, 532 F.2d 268, 270 (2d Cir. 1976).

314. *In re* Silva, 16 I. & N. Dec. 26, 30 (1976) (adopting the position of the Court of Appeals for the Second Circuit in *Francis*).

315. The circumstances of the petitioners who appear before the court merit the exercise of such an equitable remedy. In the case of petitioner Edwards, the court of appeals not only reinstated Edwards' eligibility for a section 212(c) waiver, it granted the waiver. This is a logical move because Edwards had been previously granted a waiver, but it was erroneously revoked based on *Soriano*. This exercise of *nunc pro tunc* is an especially efficient use of judicial time.

316. *Edwards*, 393 F.3d at 312.

317. *See* BLACK'S LAW DICTIONARY, *supra* note 132, at 1100.

318. Romero-Rodriguez v. Gonzales, 488 F.3d 672, 674 (5th Cir. 2007).

319. *Edwards*, 393 F.3d at 311 (applying Mitchell v. Overman, 103 U.S. 62 (1880)).

gration proceedings for petitioners who were eligible for section 212(c) relief at the time of their guilty pleas, but also provide the opportunity for them to be heard on their section 212(c) petitions.

2. The Duty to Employ a *Nunc Pro Tunc* Remedy

Now that it is widely recognized and accepted that *Soriano* was decided incorrectly,[320] steps should be taken to ameliorate the damage done to petitioners who were adversely affected by the decision. It is not enough simply to reopen deportation hearings only to determine that a petitioner's eligibility has lapsed since his original deportation hearing and deny the section 212(c) waiver on that ground. This would be an incomplete remedy. The BIA must adjudicate the petition on its merits. In order to do this, the BIA must evaluate the petition as if it were hearing it at the time of the original deportation proceedings.[321] In *Mitchell v. Overman*,[322] the Court held that "[a] *nunc pro tunc* order should be "granted . . . so as to avoid entering an erroneous decree."[323] According to *St. Cyr*, denial of a section 212(c) petition to those who were eligible for the waiver at the time of their plea agreements would be erroneous. Therefore, *nunc pro tunc* relief should be granted in order to avoid this outcome.

Not only should adjudicatory bodies employ *nunc pro tunc* in order to avoid entering an erroneous decree, they should also do so because of the duty to remedy the error. In coming to its decision, the *Mitchell* Court relied on the legal maxim *actus curiae neminem gravabit*[324] to conclude that when a delay is within the control of the court and "not attributable to the laches of the parties," a court has the duty to enter a *nunc pro tunc* decree to avoid injustice.[325] Other courts have asserted that the office of *nunc pro tunc* is "to enter an order which should have been made as a matter of course

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320. *Romero-Rodriguez*, 488 F.3d at 674 ("It is indisputable that [*Soriano*], as it relates to § 212 eligibility, was in error.").

321. If the BIA adjudicates the petition for waiver at the time of the second deportation hearing after the case is reopened, the petitioner will be found ineligible on the requirement of having served no more than five years in prison. In almost every instance, this action would effectively bar the petitioner's application, which leads one to question why the BIA would bother to reopen the proceedings in the first place.

322. *Mitchell*, 103 U.S. 62.

323. *Id.* at 65.

324. *See supra* note 165 and accompanying text.

325. *Mitchell*, 103 U.S. at 65.

and as a legal duty."[326] Thus, when the agency commits an error, regardless of whether it was clerical or a mistaken legal interpretation, a duty to correct the error is created. It is not the mere idea of equity that obligates an agency or court to correct its own errors, but also accountability to those in the system and the integrity of the system itself that demands such relief. Failing this, there would be no other check to prevent the "arbitrary exercise of governmental power."[327]

V. THE *NUNC PRO TUNC* OPERATION OF SECTION 212(C): A REALISTIC LOOK AT ITS PURPOSE AND EFFECT ON CRIMINAL ALIENS

The preceding Part established that a *nunc pro tunc* remedy is permissible and should be applied in cases where the petitioner's section 212(c) application was wrongfully denied on the basis of *Soriano*. Since a *nunc pro tunc* remedy is available, it must be determined how *nunc pro tunc* will apply. This Part discusses the proper date to which a *nunc pro tunc* order should relate back. In addition, it reiterates what factors are required in order for the petitioner to be eligible for a *nunc pro tunc* remedy.

A. *Applying* Nunc Pro Tunc *to Bring the Petitioner Back to the Time of the Final Deportation Hearing*

Since *nunc pro tunc* is a proper remedy to effectuate the adjudication of a section 212(c) petition to aliens denied a hearing based on *Soriano*, the next logical issue concerns its technical application—determining the proper date to which the order should relate back. Given the procedural progression of deportation, there are several plausible points in time: (1) the date of application for a section 212(c) waiver;[328] (2) the time of the immigration judge's order of deportation;[329] (3) the BIA's issuance of its final order of

326. Haray v. Haray, 265 N.W. 466, 469 (Mich. 1936) (quoting City of Grand Rapids v. Coit, 114 N.W. 880 (Mich. 1908)).

327. *See* Morawetz, *supra* note 56, at 125 (discussing the arguments for abandonment of the plenary power doctrine in favor of "contemporary notions of the role of the courts in checking the arbitrary exercise of governmental power").

328. This proposition was rejected by the Court of Appeals for the Second Circuit in *Buitrago-Cuesta v. INS*, 7 F.3d 291, 296 (2d Cir. 1993).

329. The petitioner in *Greenidge v. INS*, 263 F. Supp. 2d 696 (S.D.N.Y. 2003), had not served five years in prison at the time of his hearing before an immigration judge. During the time between the immigration judge's decision and his appeal before the BIA, he reached the five-year mark. The BIA denied the petitioner's application for relief because he was no longer eligible and stated that "'changes in law or fact occur-

deportation; (4) the time of the hearing before an immigration judge after the case has been reopened;[330] or (5) the date of the appeal to the BIA after the case has been reopened.[331] Of these possibilities,[332] the most persuasively logical time which to date back to is the time of the first administrative hearing before the BIA, when the final original deportation order is issued.

The date of the final deportation order is when the BIA affirms a deportation order made by an immigration judge.[333] As the Supreme Court stated in *Stone v. INS*, a deportation order "become[s] final upon dismissal of an appeal by the Board of Immigration Appeals."[334] It is the most appropriate date because it is when the petitioner is functionally adversely affected by the application of the erroneous retroactive interpretation by the agency. At this point, the petitioner has proceeded through the full administrative immigration process, including an administrative appeal.[335] The fact that a final deportation order is reviewable when it is issued does not detract from the "finality" of the order, even when there is

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ring during the pendency of administrative appeals must be taken into account.' Accordingly, the court instructed that 'the time aliens spend in prison during the course of a hearing for purposes of rendering them ineligible for § 212(c) relief' must be considered." *Id.* at 699 (quoting Anderson v. McElroy, 953 F.2d 803, 806 (2d Cir. 1992)).

330. The arguments against using this date as the proper date to determine whether a petitioner has served five years in prison would be the same as those against designating the original hearing before the immigration judge as the proper date. The main issue being that the immigration judge's deportation order is not final at this point.

331. In *Romero-Rodriguez v. Gonzales*, the BIA argued that the proper measure of the time the petitioner serves in prison, for purposes of the section 212(c) waiver, is until the time of the BIA's final decision after the case is reopened. Romero-Rodriguez v. Gonzales, 488 F.3d 672, 676 (5th Cir. 2007). Following a *Chevron* analysis, the Court of Appeals for the Fifth Circuit concluded that (1) the language of section 212(c) is ambiguous and, therefore, (2) the BIA's interpretation of section 212(c) is not impermissible. *Id.* The court, however, also concluded that if *nunc pro tunc* is determined to be available, it would serve to reinstate the petitioner's eligibility for the section 212(c) waiver. *Id.* at 679.

332. A final possible date for determining eligibility for section 212(c) is the date an appellate court acts on a petition for review of the BIA's order, or when the time for filing a petition has elapsed. This contention is rarely made, even by the BIA, since petitioners are usually barred from section 212(c) eligibility prior to this time.

333. 8 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 104.13[3][d], at 104-82.

334. Stone v. INS, 514 U.S. 386, 390 (1995) (quoting 8 C.F.R. § 243.1 (1977)).

335. 8 GORDON, MAILMAN & YALE-LOEHR, *supra* note 6, § 104.13[3][d], at 104-82 ("The INA defines a 'final order of deportation' to mean an [immigration judge]'s order of deportability that is not timely appealed, or an order by the BIA affirming an immigration judge's deportation order." (quoting INA § 101(a)(47), 8 U.S.C. § 1101(a)(47))).

a subsequent filing of a motion to reconsider.[336] Therefore, this is the point at which the erroneous interpretation of *Soriano* effectively barred the petitioner's request for section 212(c) relief and, thus, is the proper date for the remedy.

Since the Immigration Act of 1990[337] amended section 212(c) by adding the requirement that aliens convicted of aggravated felonies must serve less than five years in prison, various courts have determined that the appropriate date for assessing whether an alien has served the requisite five years in prison is the date of the alien's final administrative order by the BIA.[338] In a notable 1993 decision by the Court of Appeals for the Second Circuit, the court held that since a petitioner can accumulate time for purposes of achieving seven continuous years of lawful domicile during the pendency of his appeal from a decision by an immigration judge, he can also accumulate the time served in prison for purposes of determining the applicability of the five-year bar.[339] Additionally, in *Gomes v. Ashcroft*, the Court of Appeals for the First Circuit explicitly held that, for the purpose of determining a petitioner's eligibility for section 212(c) relief, "the relevant date is when the BIA issued its decision."[340]

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336. *Stone*, 514 U.S. at 405.

337. *See* discussion *supra* Part I.A.3.

338. *See, e.g.*, Montrevil v. Gonzales, 174 F. App'x 751 (4th Cir. 2006) (per curiam); Gomes v. Ashcroft, 311 F.3d 43, 45 (1st Cir. 2002); Buitrago-Cuesta v. INS, 7 F.3d 291, 296 (2d Cir. 1993).

339. *Buitrago-Cuesta*, 7 F.3d at 296.

340. *Gomes*, 311 F.3d at 45. The Court of Appeals for the First Circuit relied heavily on *Gomes* in deciding *Fernándes Pereira*. This reliance is seriously flawed, however. One major distinction recognized by the *Fernándes Pereira* court itself is that by the time the BIA issued its final order of deportation, Gomes had already served five years in prison. Fernándes Pereira v. Gonzales, 417 F.3d 38, 44 (1st Cir. 2005), *reh'g denied en banc*, 436 F.3d 11 (1st Cir. 2006). In *Gomes*, the petitioner's claim that he was entitled to section 212(c) relief was based on the date he filed the application, not the date of the BIA's final deportation order. *See Gomes*, 311 F.3d at 45. Another point of distinction between *Gomes* and *Fernándes Pereira* is that Gomes was convicted by a jury, whereas Fernándes Pereira pled guilty to his aggravated felony conviction. *See Fernándes Pereira*, 7 F.3d at 40; *Gomes*, 311 F.3d at 44. The Supreme Court in *St. Cyr* concluded that because it would retroactively change the consequences of accepting a plea agreement, application of the 1996 law was impermissible for those who had pled guilty prior to the change. INS v. St. Cyr, 533 U.S. 289, 325-26 (2001). The issue of whether those convicted in a jury trial are eligible for section 212(c) relief remains largely unanswered and is the source of another split between the federal circuit courts. Of the courts that have addressed this question, only the Third Circuit Court of Appeals has definitively allowed a petitioner who was convicted by a jury to apply for section 212(c) relief after the 1996 changes. *See* Ponnapula v. Ashcroft, 373 F.3d 480, 496 (3d Cir. 2004); *see also* Restrepo v. McElroy, 369 F.3d 627, 634-35 (2d Cir. 2004) (holding

The Court of Appeals for the Fifth Circuit also supports the proposition that a *nunc pro tunc* order operates to bring the petitioner back to the date of the BIA's final deportation order. While the court did not name this particular date, it asserted that "[a]llowing [the petitioner] to file his application *nunc pro tunc* would, in fact, reinstate his § 212 eligibility."[341] For such an application of *nunc pro tunc*, the proper date for determining the petitioner's eligibility must be the date of the BIA's final deportation order. This would not only be consistent with the court's construction of *nunc pro tunc* relief, but it would also remain consistent with the courts that have previously discussed the issue.

INS regulations also support the proposition that the effective *nunc pro tunc* date should be the final administrative hearing.[342] Section 1003.2(c)(1) of title 8 of the Code of Federal Regulations states:

> [A] motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act . . . may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the *administratively final order of deportation.*[343]

This regulation affords criminal aliens who were still eligible for section 212(c) relief, not having served in excess of five years imprisonment, the opportunity to apply for relief if, at the time of their final order of deportation, they still met all of the eligibility requirements. Therefore, the operative date from which a *nunc pro tunc* order would be effective should correspond to the date of the administrative final order of deportation.

B. Nunc Pro Tunc *Adjudication of Section 212(c) Petitions on Their Merits: What Factors Must Exist in Order to Be Eligible*

Because of the complexity of the issue discussed in this Note, the importance of timing and the myriad variations of circumstances under which a petitioner would seek *nunc pro tunc* relief, it

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that only certain legal permanent residents with pre-AEDPA convictions may be eligible for relief).

341. Romero-Rodriguez v. Gonzales, 488 F.3d 672, 679 (5th Cir. 2007). In so holding, the court expressly rejected the BIA's position that a *nunc pro tunc* order would not undo the fact that the petitioner had served in excess of five years in prison. *Id.*

342. Edwards v. INS, 393 F.3d 299, 307 (2d Cir. 2004).

343. 8 C.F.R. § 1003.2(c)(1) (2007) (emphasis added) (citation omitted).

is useful to summarize what factors are necessary for a petitioner to be eligible for a *nunc pro tunc* adjudication of his application for section 212(c) waiver. The following factors illustrate the narrowness of this remedy.

First, the petitioner must be a lawful permanent resident of the United States who has pled guilty to a crime constituting an aggravated felony. This guilty plea must have rendered the petitioner subject to deportation[344] and must have occurred prior to the enactment of the AEDPA and IIRIRA in 1996. It is necessary that the petitioner was incarcerated and that the INS initiated deportation proceedings against him. Second, the petitioner, who is eligible for a section 212(c) waiver as it was written prior to its repeal, must be denied the opportunity to apply for it based on the BIA's decision in *Soriano*. Finally, at the date of the final administration hearing before the BIA, the petitioner must have served less than five years in prison.

It should be noted that petitioners who already had the opportunity to have their applications for a section 212(c) waiver adjudicated should not be given the *nunc pro tunc* opportunity to do so again. In the event that the application for waiver was originally denied on its merits, an adjudicatory body should adopt that decision.[345] If the waiver was originally granted, a court should reinstate that decision and grant the waiver without remanding the case for adjudication.[346] The function of granting *nunc pro tunc* relief should be to allow the petitioner to be heard on the merits of his application, not to grant him a chance to have the matter readjudicated.

Applying *nunc pro tunc* in these circumstances is not a guarantee that an alien's petition for a section 212(c) waiver will be suc-

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344. The petitioner must not be deportable for any other reason, especially for illegal entry, because the *nunc pro tunc* doctrine applies only when the grounds for deportation are eliminated by its use.

345. In addition to finding the petitioner in *Gomes v. Ashcroft* ineligible for section 212(c) relief, the immigration judge in *Gomes* alternatively denied Gomes's 212(c) petition on its merits. When considering the petition on pre-AEDPA law, the immigration judge still denied relief upon his findings that Gomes had (1) committed multiple acts of rape for which he would not accept responsibility, (2) no significant familial ties in the United States (no one came to testify on his behalf), and (3) a serious addiction to drugs and alcohol that he was unable to control. Gomes v. Ashcroft, No. 01-30160-MAP, 2002 U.S. Dist. LEXIS 6323, at *14 (D. Mass. Apr. 9, 2002), *aff'd*, 311 F.3d 43 (1st Cir. 2002). This is yet another reason why the *Fernándes Pereira* court's reliance on *Gomes* was amiss. Fernándes Pereira's petition had not been heard on its merits.

346. This was the action taken by the Court of Appeals for the Second Circuit in *Edwards v. INS*, 393 F.3d 299 (2d Cir. 2004). *See* discussion *supra* Part III.A.

cessful, nor is it intended to be. It is intended to ensure that all aliens are properly given the opportunity to be heard; a right that is so deeply engrained in our judicial system and our sense of justice that it cannot be ignored for the sake of mere convenience. Although the nature of the waiver is discretionary, the opportunity to apply for the waiver should be given uniformly. Uniformity can be accomplished by allowing *nunc pro tunc* adjudication of these petitioners' applications on their merits.[347]

CONCLUSION

Although allowing *nunc pro tunc* relief in such circumstances would only be beneficial to a limited number of petitioners,[348] it would make an enormous difference to the few who are granted a section 212(c) waiver. For those whose livelihood and sole sense of identity are tied to the United States, it means a continued existence as they have had for years, perhaps the majority of their lives. Many noncitizens who are ordered to leave the United States risk losing their homes, families, and personal security for their indiscretions, which in some cases are relatively minor offenses. Subjecting U.S. citizens to this type of punishment would cause an outrage. But because of the statutory line between citizens and noncitizens, noncitizens suffer more dire consequences than their citizen counterparts.

In a country torn between the competing interests of national security and protection of individual rights, immigration law has served as a battleground for these interests. As many immigration reform advocates would agree, there simply is never a politically good time to reform immigration laws. Considered to be a Pandora's box of controversy, immigration reform is subordinated to whatever higher-priority agenda the government seeks to pursue and, because of this, it has not been given the attention that it deserves. Being that there is no acceptable systematic immigration reform in sight, preserving the availability of equitable relief in immigration is of the utmost importance.

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347. Since the creation of the DHS, the EOIR has been designated as the proper forum to review petitions for section 212(c) waivers. *Edwards*, 393 F.3d at 302 n.1.

348. This already limited class of potential petitioners is also decreasing as more time elapses from the passage of the 1996 laws. The April 25, 2005, deadline for motions to reopen for reevaluation of section 212(c) claims has lapsed, limiting adjudication for section 212(c) claims to petitioners whose deportation proceedings are newly initiated by the DHS.

Immigration laws are perpetually changing because of government policies that affect aliens. A noncitizen's rights should not be arbitrarily dismissed because of such changes. Because of the infinite factual permutations that arise out of the unique circumstances of each person's life, *nunc pro tunc* should be an available form of relief. It is impossible for two people to go through life accumulating the same experiences, and it is likewise impossible for two people to come before the INS by reason of the same deportable ground and have the same favorable factors. The INS must be flexible in applying the law to preserve the alien's rights, not just as a lawful permanent resident in the United States, but as a human being.

The fact that these cases are still being litigated more than ten years after the enactment of the AEDPA and IIRIRA should serve as a strong deterrent to Congress from creating laws, particularly immigration laws—given their uncommon constitutional character—that have retroactive effects. The policy decisions behind the laws reflect the confusion and tension in reconciling the desire, on one hand, to take a solid stance against terrorism and illegal immigration, and the often contravening desire, on the other hand, to protect the rights of persons regardless of their status of citizenship.

The wave of litigation caused by the 1996 Acts affecting immigration laws should serve as ample deterrence for passing laws with retroactive effect without first contemplating their consequences. The endeavor to avoid such an oversight may ultimately fail, which is why *nunc pro tunc* should be preserved as a saving grace for the deserving potential deportees who would otherwise suffer the catastrophic effects of expulsion.

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